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RE-FLAGGED KUWAITI TANKERS: THE ULTIMATE  
FLAG OF CONVENIENCE FOR AN OVERALL  
POLICY OF NEUTRALITY

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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36TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

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ABSTRACT: This thesis examines the legal status of Kuwait and the United States in the Iran-Iraq war. After concluding that both nations have violated their neutrality at times, this thesis concludes that both nations still retain their legal status of neutrality. Kuwait's neutral status legitimizes the flag transfer of the eleven Kuwaiti tankers to the United States, and prevents Iran from establishing a legal basis for the vessels' visit and search while exporting oil out of the Persian Gulf. This thesis concludes that Iran has the right to visit and search the tankers while on the way back to Kuwait, and offers a convenient alternative that should be acceptable to all parties.

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## I. INTRODUCTION

"In a word, if we don't do the job, the Soviets will."<sup>1</sup> In explaining last summer's decision to place eleven Kuwaiti oil tankers under the American flag, President Reagan had articulated the primary policy justification for the action. The policy rationale, however, did not justify the re-flagging from America's stated legal position of neutrality in the Iran-Iraq war. Under traditional international law rules, a nation is free to choose whether it will participate in a war.<sup>2</sup> A nation which chooses to abstain from participation is classified a neutral, and must remain impartial in its dealings with the belligerents.<sup>3</sup> In exchange for meeting its duty of impartiality, the neutral nation has the right of inviolability.<sup>4</sup> As part of this right, neutral nations are permitted to continue to engage in international commerce, and enjoy freedom of the seas.<sup>5</sup>

A fair argument can be made that because re-flagging directly assists Kuwait, which in turn has directly assisted the Iraqi war effort, the United States has violated its neutrality. Theoretically, so the argument goes, this violation gives Iran the option of treating Kuwait, the United States, or both, as belligerents.

This article will examine the act of re-flagging the Kuwaiti tankers in light of the traditional international law standard of neutrality, and in the context of the broad spectrum of United States and

Kuwaiti actions in the war, in order to identify their respective legal positions. The article will then focus on what actions both belligerents and neutrals are legally permitted to take consistent with their statuses, and consistent with the rubric of neutrality under international law.

## II. HISTORICAL OVERVIEW

The decision to re-flag the Kuwaiti tankers was the culmination of a series of strategic events in the Persian Gulf that took place as a result of the Iran-Iraq war. The war officially began on September 22, 1980 with the Iraqi invasion of Iran.<sup>6</sup> However, discord between the two nations had existed during much of the Shah Mohammed Reza Pahlavi's regime.<sup>7</sup> Iraq has only a forty-mile beachhead on the Persian Gulf.<sup>8</sup> An important means of access to the gulf is through the Shatt al-Arab waterway, which runs along the Iraq-Iran boundary, and connects the Iraqi port city of Basra to the gulf.<sup>9</sup> Iraq maintained that it had exclusive rights to the waterway, but the Shah wanted half of it for Iran's use.<sup>10</sup> In order to force the Iraqis to agree to his position, the Shah openly supported the rebellious Kurds of northeastern Iraq.<sup>11</sup> The other points of contention between the two nations were the disputed border territories, Zain al-Qaws and Saif Saad.<sup>12</sup> Iraq finally agreed to share navigational rights in the Shatt al-Arab waterway in exchange for Iran's withdrawal of support to the Kurds, and its claims to the border areas.<sup>13</sup> The Algiers accord of

1975 codified this agreement, leaving Iraqi President Saddam Hussein a bitter man.<sup>14</sup>

The United States had been interested in the Persian Gulf since the 1930's for one primary reason: oil.<sup>15</sup> After the British pullout in 1971, the United States developed what was called the "twin pillars" policy.<sup>16</sup> The pillars were Iran and Saudi Arabia, and the purpose of the policy was to make Iran and Saudi Arabia strong enough to protect the free flow of oil from the gulf.<sup>17</sup> Unfortunately, the "twin pillars" policy was responsible in part for the Shah's downfall, as the modernization that came with the policy clashed with Islamic fundamentalism.<sup>18</sup> The Shah's downfall and replacement by the Ayatollah Ruhollah Khomeini, coupled with the Soviet invasion of Afghanistan, led to the "Carter doctrine" and the development of the Rapid Deployment Force to protect United States interests in the gulf.<sup>19</sup> The essence of the doctrine was clear: the United States would forcibly resist any effort by outside powers to control the gulf, and would also forcibly resist any Iranian military efforts directed at the moderate Arab states of the gulf.<sup>20</sup>

The rise of the Ayatollah had another effect. It further heightened the tension between Iran and Iraq.<sup>21</sup> There was and is much personal animosity between Khomeini and Hussein.<sup>22</sup> More importantly, the shift in Iranian leadership created a fundamental difference in the way Iran and Iraq viewed their roles in the world order. Iran's legacy is the Islamic revolution, Iraq's creed is Arab nationalism.<sup>23</sup> Khomeini wants a single Islamic region stretching from Morocco to Indonesia.<sup>24</sup>



Khomeini took several actions in his first year of power which virtually assured a war between Iran and Iraq. He publicly insulted Hussein, called for Shiite revolution in Iraq, and immediately began to violate Iraqi airspace and borders.<sup>25</sup> He specifically denounced the 1975 Algiers accord, and claimed the entire Shatt al-Arab waterway for Iran.<sup>26</sup> Later, the Shah attempted to infiltrate Iraq's Ba'ath party with Shiites, and orchestrated an attempted assassination of Hussein.<sup>27</sup> Hussein felt compelled to attack Iran, in part as a measure of preemptive self-defense.<sup>28</sup> Moreover, Hussein saw the seizure of the Iranian border province of Khuzestan, with its largely Arabic-speaking population, as a means of asserting a position of Arab world leadership,<sup>29</sup> and as a rich economic prize due to the province's massive oil reserves.<sup>30</sup> Soon after the Iranians began artillery bombardments of Iraqi positions during the summer of 1980, the Iraqi Army invaded Iran.<sup>31</sup>

The war initially went well for Iraq as its forces were able to move across fifty miles of Iranian territory in the first few days.<sup>32</sup> However, the Iranians eventually held, counterattacked, and by June 1982 had crossed the prewar border.<sup>33</sup> With few exceptions the war has been a virtual stalemate since that time.<sup>34</sup>

In a desperate gamble to break the deadlock, Iraq began in 1984 to bomb both Iranian and neutral shipping going into and out of Iran. Oil exports were funding the Iranian war effort; the Iraqis hoped to cut off this support.<sup>35</sup> Iraq has been effectively blockaded since early in the war.<sup>36</sup> However, Iraq is now able to export its oil through pipelines going through Saudi

Arabia and Turkey.<sup>37</sup> Iran retaliated against Iraqi attacks on commercial shipping by hitting commerce going to other Arab states that supported Iraq.<sup>38</sup> The Iranians thus hoped to cut off some of the monetary flow into Iraq by reducing oil revenues from its Arab neighbors.

Iran has hit Kuwait particularly hard. Iran organized large-scale terrorist attacks in Kuwait in 1983, an assassination attempt against the emir of Kuwait in 1985, and may have been instrumental in oil field sabotage efforts in 1987.<sup>39</sup> The Iranians also bombed the U.S. embassy in Kuwait.<sup>40</sup> There have been indications that Syria may even have had to intervene to persuade Iran not to attack Kuwait directly.<sup>41</sup> Iran's rhetoric has been just as bellicose.<sup>42</sup> One author has said that Iran and Kuwait are on the verge of undeclared war.<sup>43</sup>

Iran has singled out Kuwait because it has supported Iraq politically and financially, and has served as a transshipment point for goods going into Iraq.<sup>44</sup> Despite singling out Kuwait, Iran does not formally recognize Kuwait as a belligerent, nor does the United States.<sup>45</sup>

In response to the Iranian pressure, Kuwait approached both the United States and the Soviet Union to seek ways to have its shipping protected.<sup>46</sup> The Soviets promptly responded by chartering three Soviet tankers to Kuwait.<sup>47</sup> Shortly thereafter, the United States agreed to reflag and protect eleven Kuwaiti tankers.<sup>48</sup> In making this decision, the administration announced that it had done so for three broad reasons: 1) to protect freedom of navigation and the free flow

of oil in the gulf, 2) to deter Iranian hegemony in the gulf, and 3) to deter Soviet expansion into the gulf.<sup>49</sup> The first convoy of protected re-flagged Kuwaiti vessels was taken down the gulf shortly thereafter, in late July 1987.<sup>50</sup>

### III. OBLIGATIONS OF NEUTRALITY

Both the United States and Kuwait claim to be neutral in the Iran-Iraq war.<sup>51</sup> Neutrality is generally defined as the "state of a nation which takes no part between two or more other nations at war."<sup>52</sup> The law of neutrality imposes a myriad of duties on neutral states. These include abstention from furnishing troops to a belligerent,<sup>53</sup> not permitting the passage of troops and war material through neutral territory,<sup>54</sup> denial of access to neutral ports and facilities,<sup>55</sup> not giving loans or subsidies to belligerents,<sup>56</sup> and not transmitting intelligence on one belligerent to the other belligerent.<sup>57</sup> In other words, the neutral country must not actively cooperate in either belligerent's war effort.<sup>58</sup> Neutrals must retain a strict indifference between the contending parties.<sup>59</sup> Neutrality requires many other duties;<sup>60</sup> these are perhaps the most important. The status of neutrality is significant in the Iran-Iraq war because it affects the legally permissible conduct which Iran may engage in towards Kuwait and the United States. With regard to the re-flagged Kuwaiti tankers, a status of neutrality strictly limits Iran's legally permissible options.

Another step besides the violation of neutrality must occur, however, before the actual status of neutrality is terminated. Whether a neutral has violated its neutrality should be a question subject to United Nations Security Council review. Objective evidence can be evaluated to determine whether a neutral has directly assisted in a belligerent's war effort. This determination lends itself to outside review. A third country's neutral status does not end, however, unless one of the belligerents takes the additional step of terminating the third state's neutrality through its own affirmative action.<sup>61</sup> Termination is accomplished through either war or hostile actions tantamount to war directed against the third state.

Neither the United Nations, nor any other third party, should be permitted to review this latter decision to terminate neutrality. This is the traditional and logical rule.<sup>62</sup> Review should be limited to whether a violation of neutrality has actually taken place. Potential Security Council review would take place after one of the belligerents had terminated a former neutral's neutrality, upon petition from the former neutral nation. In conducting this review, the Security Council should adopt the legal standard of self-defense under Article 51 of the Charter.<sup>63</sup> By definition, if a neutral violates its neutrality, it will have assisted one of the belligerents. Thus, the other belligerent may take a self-defense action in the form of war whenever a violation of neutrality has taken place. The decision whether to take the step of declaring war should be left to the offended

belligerent. Because it is consistent with self-defense under Article 51, this decision should not be subject to adverse Security Council action. The Security Council's review should be limited only to whether a violation of neutrality has actually taken place. The severity of this violation should not be open to Security Council review. The degree of damage that a violation of neutrality inflicts is subjective. The belligerent alone should determine whether it is egregious enough to justify the end of the legal status of neutrality. If the United Nations agrees that a neutral country has violated its neutrality, it should not disturb the belligerent's decision to end the status of neutrality.

The only exceptions to this proposed rule are that belligerents should be required to respond in a reasonable amount of time to violations of neutrality. This exception would be fact specific, but is designed to preclude a belligerent from legally declaring war for a violation of neutrality that took place years before, merely because it has now become convenient to do so. The other exception should be where a neutral country indirectly benefits the war effort of a belligerent. This situation arises where a neutral takes some action which permits or requires another neutral to directly assist a belligerent. As will be explained later,<sup>64</sup> the indirect action should only be regarded as a violation of neutrality if its real intent was to benefit a belligerent. These exceptions should be the only limitations on a belligerent's capacity to decide for itself whether a violation is so grave that it requires an act of war in response.

Otherwise, enforcement of neutral duties is reduced to no more than an international power game. Conversely, if the United Nations determines that no violation of neutrality has occurred, a subsequent termination of the neutrality status by a belligerent, with the accompanying physical force necessary to effect it, could be treated as unlawful aggression. The United Nations Security Council could then take steps under the Charter, such as economic sanctions or collective self-defense, to enforce the neutral's right of inviolability.<sup>65</sup> Thus, in order to determine Iran's legally permissible options with regard to the re-flagged Kuwaiti tankers, it is necessary to determine first, whether Kuwait or the United States has violated its neutrality, and second, whether Iran has taken sufficient affirmative action to signal the end of either nation's neutral status. Unless both steps have been accomplished, Iran must continue to treat Kuwait and the United States as neutrals, and must deal with the re-flagged Kuwaiti tankers accordingly.

#### A. KUWAIT'S LEGAL STATUS IN THE WAR

Kuwait, along with the other GCC nations, has helped to finance the Iraqi war effort from the outset.<sup>66</sup> These nations are concerned that should Iraq fall, Iran will then take them over, and the Persian Gulf will be nothing more than an Iranian lake.<sup>67</sup> Regardless of Kuwait's motive, this financing is a clear violation of neutrality. Financing Iraq's war effort is just as damaging to Iran as supplying Iraq with troops.<sup>68</sup> In fact, given Kuwait's meager military

force,<sup>69</sup> money is perhaps the most valuable assistance Kuwait could give.<sup>70</sup>

Cargō is transshipped through Kuwait to Iraq.<sup>71</sup> Although it is not certain whether this cargo is destined for military purposes,<sup>72</sup> the use of Kuwait's ports nevertheless assists the Iraqi war effort indirectly. Iraq could decide to use this incoming cargo to support troops in the field whether it was originally destined for military use or not. Alternatively, the cargo could be used for domestic purposes, but other domestically produced items would then be free for military use.<sup>73</sup>

Although Kuwait's ports are open to Iraq pursuant to a 1972 agreement that far predates the war, this fact does not give Kuwait permission to serve as a transshipment point for Iraq.<sup>74</sup> Iraq has been effectively blockaded since early in the war.<sup>75</sup> Transshipment of goods through Kuwait thus directly assists Iraq in the prosecution of its war effort, whether war material is shipped or not, and is therefore a violation of neutrality.

The possibility exists that Kuwait lets Iraq use its air space as an avenue of approach and escape route for its tanker attacks.<sup>76</sup> If Kuwait does permit Iraq to use its air space, Kuwait has violated another principle of neutrality.<sup>77</sup> Use of Kuwait's air space provides a direct benefit to Iraq, because it theoretically gives Iraqi fighter planes to a safe haven from Iranian attack, and because it potentially requires Iran to have air defense on a broader front.

Kuwait has also taken a public stance supportive of Iraq.<sup>78</sup> This act is not a violation of neutrality.

Public support by the press or even the government of a neutral is not a violation of neutrality unless it takes on physical characteristics which help the belligerent to conduct the war.<sup>79</sup> In other words, a neutral country does not violate its neutrality merely by stating that it hopes a belligerent will win. It only violates neutrality when it takes action to make the hope a reality. Nevertheless, Kuwait has violated its neutrality in several instances. Financing Iraq's war effort is perhaps most significant, and has had a definite impact on the war.<sup>80</sup>

In all fairness, Kuwait may not have a realistic choice whether to support Iraq. Kuwait does not want to be the next step in Iran's hegemonic designs for the gulf.<sup>81</sup> Perhaps more significantly, Iraq dwarfs Kuwait, and Kuwait has traditionally feared attack on its northern border from Iraq.<sup>82</sup> Nevertheless, Iran does not have to stand idly by and permit Kuwait to violate its neutrality just because it is too weak to protect itself.<sup>83</sup> To the extent Kuwait directly enhances Iraq's ability to prosecute the war, Kuwait violates its neutrality. Recall, however, that this does not mean Kuwait has lost its legal status of neutrality.

#### B. THE UNITED STATES' LEGAL STATUS IN THE WAR

As mentioned, the United States purports to be neutral in the war.<sup>84</sup> Nevertheless, the United States has taken several actions which clearly favored Iraq, and at least one that favored Iran. More often than not, however, United States actions have at least



demonstrated a good faith effort to remain neutral. The United States does not really want either side to win; it simply wants to end the war.<sup>85</sup> Regardless, when evaluating neutrality, the motive behind United States action is not as important as the effect the action has on the outcome of the war. Motives can be camouflaged through political rhetoric. Tangible effects are more difficult to hide, and are what ultimately contribute to the outcome of a war.

Prior to re-flagging the Kuwaiti tankers, the United States took three significant actions which could have had a direct influence on the war. First, the United States supported Iran in the now infamous Iran-Contra affair.<sup>86</sup> Second, the United States supported Iraq by giving Iraq commodity credits.<sup>87</sup> Third, the United States provided Iraq with satellite photograph intelligence.<sup>88</sup>

From the fall of 1985 to the fall of 1986, the United States sold weapons to Iran.<sup>89</sup> The purpose of these sales was to attempt to gain influence with moderate Iranian leaders, and to persuade Iran to intervene on behalf of the United States to free hostages being held in Lebanon.<sup>90</sup> Despite the plan's stated purpose, the sale of weapons to Iran was a violation of neutrality. In contrast, the United States provides no weapons to Iraq, and has turned down informal Iraqi requests for arms.<sup>91</sup> Currently, all United States businesses are enjoined from selling weapons to either combatant.<sup>92</sup> The United States has not been alone as a supplier of arms for the war, and many nations still provide both belligerents with weapons.<sup>93</sup> The United States position now is to impose

an arms embargo on either belligerent unwilling to comply with the July 20, 1987 Security Council Resolution 598,<sup>94</sup> which calls for a cease fire, a return of all forces to prewar boundaries, and negotiations for a peace settlement. At present, the recalcitrant party is Iran. Because the United States has been unable to convince the Security Council to impose an arms embargo, the United States has instigated its own plan, Operation Staunch, to attempt to persuade other nations not to supply Iran, and to complicate arms transactions whenever possible.<sup>95</sup>

The United States extended limited commodity credits to Iraq beginning in 1984.<sup>96</sup> These credits are a form of economic aid, and although not as significant as Kuwait's finance efforts, must be viewed as a violation of neutrality. The credits represent preferential economic treatment that allow Iraq to spend money on the war effort that would otherwise be needed for the commodities. The United States has also provided Iraq with satellite photo intelligence on Iranian positions.<sup>97</sup> This action is also a violation of neutrality. The United States has also shown a decided tilt towards Iraq in its political rhetoric.<sup>98</sup> As explained previously, this political support is not a violation of neutrality in and of itself.

Viewed in the context of the war, these violations of neutrality must be considered insignificant. The United States is only one of many countries which has supplied weapons. Many still do; the United States does not. United States economic aid to Iraq is paltry compared to that supplied by the members of the Gulf Cooperation Council. Whatever advantage Iraq may have

gained through United States intelligence, this assistance has only manifested itself on the battlefield in stalemate rather than advance. The actions the United States has taken to specifically demonstrate its neutrality are more significant.

In the last year the United States has taken several actions against Iran which Iran claims are acts of war.<sup>99</sup> In reality, these acts have been justifiable as self-defense under Article 51 of the United Nations Charter.<sup>100</sup> Moreover, when the United States has retaliated, it has done so in a measured and restrained fashion consistent with its position of neutrality.

When the re-flagged tanker, Bridgeton, was struck on July 24, 1987, the United States countered by capturing and sinking the Iranian vessel, Iran Ajr, which was carrying mines for future deployment.<sup>101</sup> On October 8, 1987 the United States sank three of four Iranian gunboats only after they had attacked United States helicopters.<sup>102</sup> Iranian survivors were subsequently repatriated.<sup>103</sup>

Perhaps the clearest example of the United States' desire to remain neutral came with the incident surrounding the Iranian attack on the re-flagged tanker, Sea Isle City.<sup>104</sup> Because the tanker was in Kuwaiti territorial waters, the tanker had no United States escort protection when it was attacked.<sup>105</sup> A Silkworm missile fired from an Iranian occupied former Iraqi territory, the Al Faw peninsula, hit the tanker.<sup>106</sup> The United States could have attempted to retaliate against the missile sites as a valid measure of self-defense, but chose not to for three distinct reasons all due in part to the United States' desire to

keep itself and members of the GCC neutral. First, because Al Faw is so near Kuwait, a retaliatory attack there could have been construed as Kuwaiti originated.<sup>107</sup> Second, an air assault against Al Faw would have required overflight of Oman and the United Arab Emirates, which could have been construed as violations of neutrality by those nations.<sup>108</sup> Third, and most important, an attack on Al Faw would have provided direct military benefit to Iraq.<sup>109</sup> For all of these reasons, as well as the practical problem of the mobility of the Iranian missile sites,<sup>110</sup> the United States determined not to hit Al Faw. Instead, the United States attacked and destroyed an Iranian oil platform in the middle of the gulf which had been used as a base for patrol boat harassment of neutral shipping.<sup>111</sup> The platform was destroyed only after a twenty minute warning to flee.<sup>112</sup>

The common characteristics of all of these self-defense actions are that they were carried out in international, not Iranian, waters, that attempts were made to reduce or eliminate casualties, and that no expansion was made to the direct defense of any gulf nation.<sup>113</sup>

The United States position of neutrality has been marked as much by what it does not do as by what it does. The United States decided to reject a proposed plan to attempt direct stoppage of Silkworm shipments from China to Iran.<sup>114</sup> The United States does not convoy into Kuwait's territorial waters, seeing that as the responsibility of Kuwait,<sup>115</sup> and does not generally take action to protect any other neutral shipping in the gulf, whether attacked by Iran or Iraq.<sup>116</sup> One

could wonder how the United States would have reacted, if the Stark had been hit by an Iranian missile rather than by an Iraqi,<sup>117</sup> suggesting that the United States' failure to retaliate there demonstrated a preference for Iraq.<sup>118</sup> The United States has, however, said that it believes the attack was an honest mistake, and not an act of aggression.<sup>119</sup> Moreover, reasoning that United States' failure to retaliate against Iraq is a violation of neutrality requires looking into the motive for inaction, not a useful way of analyzing neutrality.<sup>120</sup> The United States has had a military presence in the gulf for years.<sup>121</sup> Its presence there now should not be seen as favoring either side.<sup>122</sup> Overall, it appears that the United States has sought to preserve its neutrality more often than it has not. Moreover, the United States has not violated its neutrality for some time. United States neutrality violations are probably too remote to give Iran a legal justification to declare war against the United States.

#### C. SPECIFIC ANALYSIS OF THE NEUTRALITY OF RE-FLAGGING

The Department of State has indicated that re-flagging is accepted practice in domestic and international law.<sup>123</sup> The Coast Guard formalized re-flagging procedures in 1981.<sup>124</sup> Fifty foreign vessels have applied for United States re-flagging since that time; and prior to re-flagging the Kuwaiti tankers, forty-four had actually been re-flagged.<sup>125</sup> The re-flagging system was not specifically designed for protection of

the Kuwaiti tankers. The system had been in place for some time.

Kuwait, or any other country, can register its ships under the American flag if it meets Coast Guard requirements.<sup>126</sup> The purpose of re-flagging, theoretically, is to enhance the capability of the United States Merchant Marine in times of national emergency, and to enhance the United States shipping industry.<sup>127</sup> In return, the vessels get the benefits of flying the United States flag, including the protection of the United States Navy.<sup>128</sup>

The re-flagging was accomplished because the Kuwaiti tankers were being singled out for attack by Iran, and they needed protection from them.<sup>129</sup> The Kuwaitis asked both the Soviet Union and the United States for protection.<sup>130</sup> When it became clear that unless the United States protected the vessels the Soviet Union would, the United States decided to protect them.<sup>131</sup> The United States did not want to give the Soviets further access to the gulf.<sup>132</sup> Further Soviet involvement could have accomplished exactly that.<sup>133</sup> Thus, the act of re-flagging was accomplished not to help the Iraqis or Iranians; it was accomplished to protect Kuwait's ability to export oil, and to keep the Soviet Union from exercising further control in the gulf. Nevertheless, in order to assess its neutrality, the act must be analyzed in terms of the effect it had on the belligerents' ability to prosecute the war.

Re-flagging Kuwaiti tankers does assist Iraq indirectly. If Kuwait's ability to export oil is hampered, Kuwait's oil income is reduced. Its ability

to finance the Iraqi war effort is therefore reduced. Kuwait has a total of twenty-eight tankers in its fleet.<sup>134</sup> Of these, twenty-two carry oil and petroleum products, eleven are re-flagged with the American flag, and two carry the British flag. The rest operate outside the gulf and fly various flags.<sup>135</sup> Thus, the United States protects one-half of Kuwait's oil tankers. This protection does not equate to one half of Kuwait's total oil exports, however. Seventy percent of Kuwaiti oil is exported on foreign vessels not attached to Kuwait's fleet.<sup>136</sup> Of the thirty percent exported on vessels owned by Kuwait, only fifteen percent is under United States protection.<sup>137</sup> Moreover, even before the United States offered to protect Kuwaiti tankers, Iranian attacks hit only six percent.<sup>138</sup> It is not as if United States protection has prevented Kuwait's economy from disintegrating. Kuwait could still support Iraq, and fearful of Iranian hegemony, it probably would. Nevertheless, in the strictest numerical sense, re-flagging does indirectly assist Iraq.<sup>139</sup>

The question then becomes whether indirect assistance to a belligerent violates neutrality. As explained earlier, in the case of indirect assistance, the neutral's intent should be evaluated despite the pitfalls of doing so. In the case of a neutral directly assisting a belligerent, the neutral should not be able to explain away its action by saying that the action was only taken for the benefit of the neutral. In that case, the neutral knows that it is helping a belligerent to prosecute the war. In the case of indirect assistance, the neutral may take an

action that affects the war merely because of the global nature of national economies, or because it did not know that the action would serve as a catalyst for yet another neutral nation's direct assistance to a belligerent. Indirect assistance should only be viewed as a violation of neutrality if the intent of the act was to directly benefit one of the belligerents. Otherwise, there is virtually no stopping point to actions that could be classified as violations of neutrality. For example, the United States sells weapons to Israel, which in turn sells them to Iran, providing indirect assistance to Iran by the United States.<sup>140</sup> The Soviet Union permits its East European satellites to sell arms to Iran,<sup>141</sup> thus providing indirect assistance by the Soviet Union. Japan buys oil from Iran.<sup>142</sup> In a sense, this financial backing is just as important as the support Iraq gets from Kuwait. In fact, with the world's economy as interdependent as it is, virtually any market decision would have some indirect impact on the belligerent's ability to prosecute the war. Where there is direct assistance to a belligerent, the neutral should be held accountable. But where there is indirect assistance, the action should only be denominated a violation of neutrality if the intent was to use the indirect assistance to camouflage the real goal of directly assisting a belligerent.

Kuwait approached the United States and asked for assistance.<sup>143</sup> Kuwait is a friendly nation to the United States, and does not consider itself part of the war.<sup>144</sup> The United States may protect Kuwait's vessels from attack. It may protect any neutral's vessels from



belligerent attack. The United States may render assistance under Article 98 of the U.N. Convention on the Law of the Sea.<sup>145</sup> France already assists neutral vessels while relying on this humanitarian duty.<sup>146</sup> By protecting re-flagged Kuwaiti vessels, the United States actually protects less than it has a right to. Re-flagging is in a sense simply a method of defining for Iran the extent to which the United States will exercise its right to render humanitarian aid to all neutral shipping.

The United States took the action of re-flagging consistent with its humanitarian right to protect neutral freedom of the seas. The United States has assisted Kuwait, not because it wanted to help Iraq, but because it wanted to assist Kuwait, and it wanted to keep the Soviet Union out of the gulf. Re-flagging does indirectly assist Iraq, but that was not the purpose of re-flagging. The act is too attenuated to be a violation of neutrality.

It has been suggested that because the United States does not protect all neutral shipping in the gulf, but only that of an "ally" of Iraq, the United States violates its neutrality.<sup>147</sup> It is probably not feasible for the United States to protect all shipping in the gulf.<sup>148</sup> The United States cannot afford to place the necessary assets in the gulf, either from a global defense standpoint or from an economic one.<sup>149</sup> Moreover, the United States does not protect other neutral shipping from Iranian attack.<sup>150</sup> It only protects re-flagged Kuwaiti tankers.<sup>151</sup> United States treatment of other neutral shipping is the same for both belligerents. The United States generally does

not protect other neutral shipping from either Iranian Iraqi attacks. Equal treatment for both belligerents is a consistent exercise of United States neutrality in the gulf.

As has been seen, both Kuwait and, to a lesser extent, the United States have at times violated their neutrality in the Iran-Iraq war. If these violations meant that these nations were no longer entitled to a neutrality status, Iran would have a broader range of options open to it with regard to the re-flagged Kuwaiti tankers. That is not the case, however. It takes more than a mere violation of neutrality to end the neutral status.<sup>152</sup>

The legal status of neutrality ends when a violation of neutrality has taken place, and the offended belligerent timely acts to terminate the status of neutrality. Alternatively, neutrality ends when a belligerent attacks a neutral in violation of its neutrality, and the neutral responds by an act of war against the belligerent. In other words, if Iran wants to signal that it no longer recognizes Kuwait's or the United States' neutrality, Iran must either declare war or take substantial actions tantamount to war. Iran has not done that yet. If this were not the case, Iran would be both at war with, and a co-belligerent of, both the United States and the Soviet Union. It is virtually impossible not to take some action which could theoretically be construed as a violation of neutrality.

Iran has not declared war on either the United States or Kuwait. Iran has not even stated that Kuwait is a belligerent.<sup>153</sup> Iran's rhetoric is harsh,<sup>154</sup> but

Iran's rhetoric is harsh towards the whole world. The traditional international law rule was that hostilities were acts of war which brought neutrality to an end.<sup>155</sup> The formal act of declaring war has in many cases become irrelevant.<sup>156</sup> As has been seen, Iran has taken many hostile actions against both the United States and Kuwait. But, gratuitous hostility has been the sine qua non of the gulf tanker war. If hostility is the test for an ending of neutrality in the Iran-Iraq war, both belligerents are at war with most of the world.<sup>157</sup> Given the belligerents' propensity for bending the rules of international law, it seems that neither bellicose rhetoric nor shipping attacks is sufficient to end neutrality. It would require a formal declaration of war, or an open attack against Kuwaiti or United States territory to end neutrality.<sup>158</sup> An attack against military targets of either nation, as opposed to commercial targets, would also suffice.

The set of options open to Iran in dealing with the United States and Kuwait generally, and the re-flagged tankers in particular, depends on whether Kuwait and the United States are neutrals or belligerents. Kuwait continues to violate its neutrality by financing Iraq's war effort, and using its ports as transshipment points. United States violations of neutrality are perhaps too stale to legitimize an Iranian act of war against the United States. Regardless, these nations are neutral at least until Iran chooses they be otherwise. To an extent then, Iran's legally permissible options are determined by Iran. This does not mean, however, that Iran has the best of both worlds. There are obvious advantages to Iran if

Kuwait and the United States retain neutrality. As long as these nations are neutral, then, at least theoretically, they are deterred from assisting Iraq. Moreover, Iran is not required to take on additional belligerents in the war. These facts are potent deterrents in Iran's decision whether to end Kuwait or United States neutrality. Unless Iran wants to take on the additional responsibilities of war with three nations, it must legally continue to treat Kuwait and the United States as neutrals.

Of course, Iran could decide to leave the United States alone, and terminate only Kuwait's neutrality. In that case, the eleven re-flagged tankers should still be treated as neutral vessels if they are of U.S. nationality. Both Kuwait and the United States claim exactly that.<sup>159</sup> Iran does not recognize this claim, however,<sup>160</sup> and in truth there is much to be said for Iran's position.

#### IV. STATUS OF THE RE-FLAGGED TANKERS

In effect, Iran's position is that the transfer to the United States is a sham transaction. Iran's position is that these eleven tankers are still Kuwaiti vessels regardless of what flag they are flying.

Generally speaking, under international law, a nation decides for itself whether a ship is entitled to fly its flag.<sup>161</sup> Flagging plus documentation under the nation's municipal law confers nationality on the vessel.<sup>162</sup> In return for meeting nationality requirements, these vessels receive the protection and benefits of municipal law.<sup>163</sup>

There are two international law requirements that must be met before a vessel's nationality will be recognized. First, there must be a genuine link between the vessel and the flag it flies.<sup>164</sup> Second, the vessel must comply with a nation's municipal law requirements.<sup>165</sup> Both requirements are subject to more intense scrutiny during time of war.<sup>166</sup>

The "genuine link" requirement has been the subject of much debate in international law circles.<sup>167</sup> Much of this debate centers around the issue of whether a nation may challenge a vessel's registration under another nation's flag.<sup>168</sup> The International Court of Justice could decide disputes over "genuine link."<sup>169</sup> But this resolution would only come about if both parties agreed to let the ICJ resolve the dispute.<sup>170</sup> Essentially, nations are still free to decide for themselves what constitutes a "genuine link."<sup>171</sup>

The United Nations Convention on Conditions for Registration of Ships seeks to ensure a "genuine link" between a state and ships flying its flag, but imposes standards which any good faith effort can easily meet. Article 7 of the convention gives signatories two ways to meet the standard, compliance with Article 8 or compliance with Article 9.<sup>172</sup> Article 8 requires ownership of ships, "sufficient to permit the flag State to exercise effectively its jurisdiction and control over ships flying its flag."<sup>173</sup> Article 9 requires only that a "satisfactory" part of a ship's officers and crew be nationals or domiciliaries.<sup>174</sup> Nations can decide for themselves whether ownership is sufficient for control or whether there are satisfactory numbers of national officers and crew. Presum-

ably, a state could prescribe minimal standards for ownership or manning and still meet the convention requirement. Moreover, under Article 7, a state can satisfy the "genuine link" requirement by compliance with either ownership or manning.

The United States recognizes the "genuine link" requirement for re-flagging the Kuwaiti tankers, and has asserted that United States registration laws meet the standard.<sup>175</sup> The Vessel Documentation Act of 1980<sup>176</sup> requires vessels to meet United States safety and inspection standards, be United States owned, and have a United States master.<sup>177</sup> Under the test for "genuine link" described in the United Nations Convention, compliance with this statute does meet the international law standard.<sup>178</sup>

Chesapeake Shipping, Inc. owns the eleven Kuwaiti oil tankers.<sup>179</sup> It was incorporated on May 15, 1987 as a Delaware corporation.<sup>180</sup> The Kuwaitis still control the corporation, however, and the Kuwait Oil Tanker Company owns all the shares.<sup>181</sup> Chesapeake is a shell corporation in the truest sense of the word.<sup>182</sup> Nevertheless, this type of ownership is permissible under the Vessel Documentation Act,<sup>183</sup> and has been allowed in other cases prior to the Kuwaiti re-flagging.<sup>184</sup> The corporation must have a United States citizen chief executive officer and a United States citizen chairman of the board of directors.<sup>185</sup> Fifty-one percent of the directors must be United States citizens.<sup>186</sup> Three of the four Chesapeake directors are citizens of the United States as well as the chief executive officer and chairman of the board.<sup>187</sup> Thus,

Chesapeake meets the ownership standards of the Vessel Documentation Act and international law.

The issue of compliance with manning requirements is somewhat more problematic. United States law requires a United States master;<sup>188</sup> it also requires seventy-five percent of the seamen on board a vessel to be American citizens on each departure from a port of the United States.<sup>189</sup> Another part of the statute reads that when a documented vessel is deprived of a seaman's service while on a foreign voyage, a foreign citizen may fill the vacancy.<sup>190</sup> The Administration has read the latter two provisions to mean that vessels that do not enter United States ports need not meet the citizenship manning requirements.<sup>191</sup> This reading seems sophistic. The word "deprived" in the statute should imply that manning requirements were initially met, but because of some mishap during the voyage such as illness or simply quitting the job, a seaman was no longer available and the vessel was thus "deprived."<sup>192</sup> The officers on the eleven re-flagged tankers are British, West German and Kuwaiti.<sup>193</sup> The crewmen are Filipino.<sup>194</sup> The failure to man these vessels with United States citizens is particularly significant, because manning is one of the primary reasons many American owned vessels opt for the so-called flags of convenience from Panama, Liberia, and Honduras.<sup>195</sup> The owners choose flags of convenience because they cannot afford to pay American wage rates.<sup>196</sup> These vessels do not receive the protection of the American Navy. This result is paradoxical. Merely because re-flagged vessels do not serve United States ports, they

are able to meet United States documentation requirements.

Failure to meet citizenship requirements raises another concern. A primary reason for placing a vessel under the United States flag is to make the vessel susceptible to requisition in time of national emergency pursuant to the Merchant Marine Act of 1936.<sup>197</sup> It is questionable whether re-flagged vessels with foreign crews would respond in time of national emergency. Moreover, use of foreign crews defeats another reason for the registry statutes--jobs for Americans.<sup>198</sup>

The re-flagged vessels do not meet United States safety and inspection standards either,<sup>199</sup> although they do meet internationally accepted standards.<sup>200</sup> The Department of Defense authorized a one year waiver from the United States specifications.<sup>201</sup> The waiver statute is so broad that it could conceivably be read to eliminate all of the normal statutory documentation requirements. Invocation of the waiver requirements emasculates the entire purpose of the documentation statute.

The net effect of using the manning and inspection loopholes is to make compliance with United States law concerning re-flagging questionable in the case of the eleven Kuwaiti tankers. The problem is that even though the United States has complied with one international law standard by virtue of ownership vested in a shell corporation, it could run afoul of another requirement, that a nation at least require vessels to comply with municipal standards before granting nationality.<sup>202</sup>



Iran's argument is even more tenable because of the state of war between Iran and Iraq. The doctrine supporting Iran's claim is the colorable transfer rule, which in essence states that a nation may not give a previously belligerent vessel its flag during time of war on the sole ground that it will thereafter be able to engage in neutral commerce and avoid capture and condemnation under prize law.<sup>203</sup> One of the tests for disproving colorable transfer is whether valid consideration is given in exchange for the transfer.<sup>204</sup> Still another test is whether the enemy retains control over the vessel.<sup>205</sup> If Kuwait is a belligerent, under either of these tests Iran need not recognize the flag transfer to the United States.<sup>206</sup> Nevertheless, my position has been that Iran has not authoritatively signalled the end of Kuwait's neutral status, and thus could not invoke the colorable transfer rule.<sup>207</sup> But this position is certainly open to debate, and if Kuwait is a belligerent, under the colorable transfer doctrine, Iran can treat these vessels as belligerent Kuwaiti vessels. This status would afford Iran far more latitude in dealings with the vessels.

Other international precedent produces the same result. During the Seven Years War, the British stopped Dutch vessels from trading with the American colonies because the vessels were too closely connected to Britain's enemy, France.<sup>208</sup> The British invoked this rule again against Germany in World War I,<sup>209</sup> and advocated a rule that in time of war transfers were presumed invalid.<sup>210</sup> The British suggested that the test was whether the trade remained the same before and

after the transfer from belligerent to neutral use.<sup>211</sup> The French position was that the transfer was valid only if it would have taken place had there been no war.<sup>212</sup> As for corporate ownership, a position has also been articulated which invalidates ownership as evidence of national character, if the corporation was controlled from offices located in belligerent territory, even after the transfer had taken place.<sup>213</sup> Each of these tests seems to support Iran's position. These vessels are performing exactly the same trade as they were before re-flagging.<sup>214</sup> The transfer was made only because of the war.<sup>215</sup> Chesapeake is run from Kuwait.<sup>216</sup> There really seems little doubt that Iran could continue to treat these vessels as Kuwaiti vessels if Kuwait is a belligerent. Thus, if Kuwait is belligerent, the Iranians may treat the tankers as belligerent, and exercise one set of options. If Kuwait is neutral, under international law the vessels must be treated as neutral,<sup>217</sup> activating another set of options for Iran.

V. BELLIGERENT RIGHTS AND DUTIES: KUWAIT A  
BELLIGERENT--VESSELS ARE KUWAITI

A. RIGHT OF CAPTURE

Belligerent parties have the right to capture the ships and goods of each other on the high seas.<sup>218</sup> The cargo of enemy ships is subject to seizure and condemnation as a maritime prize regardless of whether it is contraband.<sup>219</sup> Thus, if Kuwait is a belligerent, Iran can lawfully attempt to seize the oil tankers and the

oil within them. This right flows from the right to capture enemy property and the right to blockade enemy ports.<sup>220</sup> Whereas the law of contraband permits the belligerent to stop imports into an opposing belligerent's ports if the import increases fighting capability,<sup>221</sup> the latter rule permits capture of any enemy export on the ground that it prevents the enemy from financing its war effort.<sup>222</sup> This rule governs the export of oil from Kuwait, if Kuwait is belligerent. The oil finances the Iraqi war effort. The tankers return to Kuwait in ballast; that is not the concern.<sup>223</sup> The concern is that Kuwait's oil money allows the Iraqis to purchase the sophisticated weaponry needed to offset Iran's numerical advantage.<sup>224</sup>

#### B. RIGHT TO BLOCKADE

Another option Iran could use to stop the tankers if Kuwait is belligerent, is the blockade. The blockade is designed to prevent both imports and exports, thus destroying the enemy's commerce and crippling its resources.<sup>225</sup> The blockade would thus benefit Iran by preventing Kuwait from exporting oil, and using its ports as transshipment points for goods bound for Iraq. Not only would the re-flagged tankers be prohibited from departing Kuwait, other neutral countries would be prohibited from commerce of any kind with Kuwait.<sup>226</sup> The theory behind this prohibition is that Kuwait is a belligerent, and Iran can use the blockade to bleed Kuwait of its resources even at the expense of other neutral countries.

Iran would have to meet five requirements in order to have a lawful blockade. First, the blockade has to be effective. In other words, Iran would have to commit a naval force sufficient to deny ingress and egress to Kuwait.<sup>227</sup> Second, the government of Iran has to officially authorize the blockade.<sup>228</sup> Third, Iran must formally notify third party nations of its intent to blockade.<sup>229</sup> Fourth, Iran cannot extend its blockade to neutral coasts.<sup>230</sup> Finally, Iran must apply the blockade impartially towards all third party nations.<sup>231</sup> If Iran could meet all of these requirements, it could capture any vessel which attempted to run the blockade.<sup>232</sup> Capture can take place so long as the blockade existed, the party attempting to run the blockade knew of the blockade, and the blockade was violated.<sup>233</sup>

Iran may not legally impose a blockade, because it does not have the naval assets to make it effective.<sup>234</sup> Iran may still try to capture Kuwaiti vessels. United States intervention would undoubtedly vitiate this option, but that does not mean the Iranians are legally precluded.<sup>235</sup> The options Iran may exercise if Kuwait is treated as a neutral are the most feasible for Iran. Specifically, Iran should legitimately be able to insure that vessels going to Kuwait are not carrying cargo for Iraq.

#### VI. KUWAIT A NEUTRAL--TANKERS ARE LEGITIMATE UNITED STATES FLAG VESSELS

A vessel of a neutral may be subject to seizure and condemnation as a prize, if it acts in a manner

inconsistent with neutrality.<sup>236</sup> Neutral nations are bound to acquiesce, if belligerents pursue this right.<sup>237</sup> Failure to do so is a violation of neutrality.<sup>238</sup> For purposes of seizure and condemnation, there are three ways a neutral vessel may violate its neutrality. The neutral vessel violates its neutrality if it engages in unneutral service, attempts to break a blockade, or carries contraband to a belligerent.<sup>239</sup> Belligerent nations are given the right to capture, because neutral nations refuse to take responsibility for private shipping.<sup>240</sup> The right grows out of a duty of self-preservation.<sup>241</sup> If the belligerent does not enforce adherence to neutrality, no one will.

Before the belligerent can exercise its right of capture, it must have probable cause to believe that a violation of neutrality occurred.<sup>242</sup> As in other areas of the law, probable cause here means a reasonable belief that the vessel is engaged in illegal traffic.<sup>243</sup> It is less evidence than would be necessary to condemn the vessel.<sup>244</sup> In The Newfoundland, a United States ship seized a British vessel off the coast of Havana on the ground that it was trying to violate a blockade of Havana during the Spanish-American War. The evidence in favor of condemnation was that the Newfoundland was found near Cuba's coast, that a United States Naval officer boarded the Newfoundland and told the master to sail out of the area, but that the Newfoundland was slow to do so, and that the Newfoundland's position was inconsistent with its ultimate destination, Kingston, Jamaica.<sup>245</sup> The court held that this evidence was sufficient for probable cause, but insufficient for condemnation.<sup>246</sup>

#### A. UNNEUTRAL SERVICE

The term "unneutral service" would seem to include both breach of blockade and transport of contraband, since these activities are by definition unneutral. But unneutral service has traditionally not been defined in this manner; it means something different.<sup>247</sup> A vessel engages in unneutral service if it is employed for any purpose other than contraband transport or blockade breach, that advances the belligerent interests of a state.<sup>248</sup> The three examples commonly given are transport of belligerent troops, transport of intelligence, and use as hostile vessels.<sup>249</sup> Neither party has used neutral ships for hostile purposes in the gulf, nor have they been used to transport troops. Transport of intelligence is obviously an anachronism. Nevertheless, if either party engaged in unneutral service, the offended party could exercise the right of capture. The rule against blockade breach to a lesser extent, and the rule against contraband transport to a greater extent, could play a significant role in the Gulf, however.

#### B. RIGHT TO BLOCKADE

Iran has successfully blockaded Iraq since early in the war.<sup>250</sup> Any vessel attempting to breach this blockade would be subject to capture. The blockade rule does not cover cargo originally bound for Kuwaiti ports, even if the cargo's ultimate destination is Iraq. The law of contraband covers this type of

cargo.<sup>251</sup> In The Imina, cargo was originally destined for an enemy port. Upon running into a blockade, the master of the vessel took his cargo to a neutral port. The belligerent subsequently seized the cargo, claiming a breach of blockade. The prize court held that the cargo was not good prize; the vessel must be on the way to a belligerent port before the rule of blockade applies.<sup>252</sup>

A key distinction between the law of blockade and the law of contraband is that the cargo is irrelevant in blockade.<sup>253</sup> Once a lawful blockade is established, ships are subject to capture even if the cargo is something as innocuous as a load of toys for children. If there is no blockade, only vessels carrying contraband are subject to seizure.<sup>254</sup> The Peterhoff,<sup>255</sup> a United States Civil War case, illustrates this point. A Union warship captured the Peterhoff, a British merchant vessel, near the island of St. Thomas. The ship's papers indicated that the Peterhoff would unload its cargo through the Rio Grande to Matamoras, Mexico. Eventually, the cargo would be transported via an overland route to Confederate forces in Texas. The North had instituted a blockade of the Texas coast near Brownsville. The Supreme Court held that the blockade was not meant to cover Rio Grande access to Matamoras, and denied the right to capture for breach of blockade. The Court nevertheless upheld the prize, because the ultimate destination of the cargo was not Mexico, but belligerent Confederate forces, and because the cargo, including artillery boots and government issue gray blankets, was contraband.<sup>256</sup> A similar situation could easily arise in the Persian Gulf. Kuwait and Iraq are

contiguously located. A neutral vessel could attempt to avoid Iran's blockade of Iraq by dropping the cargo off at Kuwait first, with an ultimate destination of Iraq. This cargo would not be subject to capture for breach of blockade, but could be captured as contraband.<sup>257</sup>

Blockade could also come into play if Iran attempted to blockade the entire Persian Gulf at the Strait of Hormuz. Although Iran could not close the strait with naval vessels, it could create a de facto closure by using Chinese made Silkworm missiles that can range the gulf, and could scare shippers away from entering the Strait.<sup>258</sup> Iran would only have the capability of closing the gulf for a matter of days due to limits on their Silkworm supply, and would risk direct United States intervention. Nevertheless, Iran could fashion at least a colorable argument that it has the right to attempt a blockade under either of two theories. Iran could claim blockade of a territorial strait, or it could claim long-range blockade. The strait separates Iran and the United Arab Emirates. Blockade of a territorial strait is more justifiable when the strait separates territory of the same state, such as the Dardanelles and the Bosphorous.<sup>259</sup> Nevertheless, there is no clear prohibition against imposing a blockade where the strait divides two states.<sup>260</sup> The distinction would seem to be that a blockade would cut off all commerce to Gulf Cooperation Council states, not just Iraq, and would thus seem to be an illegal violation of freedom of the seas. The same could be said of Iran's other possible justification, the long-distance blockade. The British used



this concept in World War I, over United States objection, to interdict neutral shipping to Germany, whatever the cargo, wherever the vessel.<sup>261</sup> Even assuming the legality of this tactic, the Iranian situation is somewhat inapposite in that not all commerce in the gulf would be bound for Iraq.

Blockade in the Iran-Iraq war is not that significant. Iraq is blockaded, but Iraq can export its oil through pipelines to Turkey or Saudi Arabia. It can import weapons and other needed imports through overland routes or by air. The most significant legal issue for neutral nations trading in the gulf surrounds the law of contraband and the set of options open to Iran for stopping the flow of contraband goods to Iraq.

#### C. RIGHT TO CAPTURE CONTRABAND

Traditionally, neutral countries were permitted to continue to engage in commerce with a belligerent so long as goods imported into the belligerent did not help its war effort.<sup>262</sup> Importation of goods which helped a belligerent to prosecute the war was a violation of neutrality.<sup>263</sup> Goods which were susceptible to belligerent use and bound for a belligerent destination were called contraband.<sup>264</sup> Contraband is subject to the right of capture.<sup>265</sup> Cargo had to be both susceptible of enemy use and destined for the enemy before the right of capture could be invoked. Belligerents were allowed to visit and search neutral vessels to determine whether contraband was aboard.<sup>266</sup>

Traditional rules of contraband recognized three separate classes of cargo.<sup>267</sup> The first classification

was called absolute contraband. These were items which were presumed to only be of use in war, and thus were presumed to be intended to assist the war effort. Included in this category were arms and ammunition.<sup>268</sup> These items could nearly always be captured.<sup>269</sup> The next category was conditional contraband, items which could be used to prosecute the war effort, but did not necessarily have to be used in that manner.<sup>270</sup> This cargo could be captured only upon evidence that the cargo would actually be used for combat purposes.<sup>271</sup> Included here, for example, were provisions, coal and gold.<sup>272</sup> Oil would presumably be in this category.<sup>273</sup> The final category was called free articles, which included provisions for the sick and wounded.<sup>274</sup> This cargo was never subject to capture.

The trend even seventy years ago was to greatly reduce attempts to classify contraband in favor of banning all imports to the enemy, on the ground that all trade gives the enemy assistance.<sup>275</sup> Humanitarian imports should still be an exception,<sup>276</sup> but otherwise, in today's interlocking economy, where governments can have so much control over the final destination of cargo, it makes little sense to continue to draw the distinction.<sup>277</sup> Since World War II, most nations have not drawn distinctions between imports to belligerents.<sup>278</sup>

In order to invoke the right of capture, contraband goods have to be destined for belligerent use.<sup>279</sup> For example, a shipment of ammunition to Kuwait is not subject to capture, if the ammunition is not ultimately bound for Iraq. But if Kuwait is merely a stopover point for cargo bound for Iraq, the cargo may be

captured before it ever gets to Kuwait. This is the doctrine of ultimate destination.<sup>280</sup>

The doctrine of ultimate destination arose out of necessity as belligerent nations used elaborate commercial schemes to route cargo undetected through neutral countries. This technique emasculates the right of capture, permitting the belligerent to use the neutrality shield as a sword. Thus, in World War I, Great Britain lawfully captured foodstuffs from the United States to Denmark, because the foodstuffs were ultimately destined for Germany.<sup>281</sup>

It is at times difficult to prove ultimate destination, particularly for conditional contraband. The test developed is called the common stock test.<sup>282</sup> Cargo which is to become part of the neutral's common stock is not capturable. Common stock in this context, means that the general public will consume the commodity, rather than the military. If the neutral's importation of a particular commodity exceeds its peacetime requirements, the presumption is that the commodity is not going to the common stock, but rather is ultimately destined for export to the enemy.<sup>283</sup> If neutral states are shipping cargo to Kuwait that is ultimately bound for Iraq, the Iranians may capture it.<sup>284</sup> It does not matter that the final leg of the cargo's journey is by land over Kuwait's border.<sup>285</sup> The only requirement is an Iraqi final destination.

The rule of capture does not apply unless the product itself is destined for the belligerent. Some commodities are interchangeable in the marketplace. Margarine may be used as a substitute for butter, for example. Margarine imported into Kuwait could take

butter's place in the common stock, and thus make it possible to ship butter into Iraq. If this situation arose, the butter would be subject to capture, but not the margarine. The rule of capture does not extend to the consequences of a product's importation.<sup>286</sup> Thus, Kuwait might import M16 rifles for Kuwait's own defense, making their supply of AK47s surplus for shipment to Iraq. Iran could capture AK47s bound for Iraq; they could not capture the M16s.

## VII. VERIFICATION OF NEUTRAL CARGO

### A. RIGHT OF VISIT AND SEARCH

The belligerent's traditional method for verifying the legitimacy of neutral shipping is visit and search.<sup>287</sup> In order to ascertain a neutral vessel's cargo, the belligerent may "visit" the neutral vessel, and "search" its papers and cargo.<sup>288</sup> If probable cause exists to believe the vessel is carrying cargo for belligerent use, the vessel may be captured and taken to a belligerent port for either a further verification of cargo and destination, or further adjudication as prize.<sup>289</sup>

The right to visit and search is said to be a right flowing from the right of capture.<sup>290</sup> It is a means justified by the end,<sup>291</sup> and a recognition that there is no other way a belligerent can avoid being defrauded by improper neutral shipping.

The right to visit and search is a right of self-preservation, and thus the right has traditionally been very broad. The right applies whatever the ship,

whatever the cargo, whatever the destination.<sup>292</sup> A neutral vessel may attempt to elude visitation,<sup>293</sup> but if it does, the belligerent may chase the neutral vessel and force it to bring to.<sup>294</sup> Further, if the neutral vessel forcibly resists visit and search, at least the vessel, and possibly the cargo as well, is subject to capture and condemnation as prize, even if the cargo and vessel are ultimately determined to be neutral.<sup>295</sup> This rule is designed to deter neutral vessels from resisting search. Visit and search is supposed to be a peaceable means of verifying compliance with the neutral trade rule. If neutrals are allowed to ship contraband with impunity, belligerents would have to resort to force. The sanction helps to keep neutral shippers honest.

Neutral countries located next to belligerents must be particularly careful to monitor imports so that transshipment suspicions are not aroused. During the Civil War the problem often arose when British merchants would use neutral islands in the West Indies as transshipment points for goods going to the Confederacy. In The Springbok, the United States Supreme Court suggested that any deviation between cargo lists and cargo on board could be grounds for condemnation where the neutral country has previously been used as a transshipment point.<sup>296</sup> Again, this rule is one of survival. If a belligerent is going to allow neutral shipping, it must be able to count on the neutral's good faith.

The right of visit and search is not an absolute right. When the belligerent can ascertain that a neutral vessel's cargo is innocuous without exercising

the right of visit and search, the right disappears.<sup>297</sup> It is not a right to seize, harry or interfere with neutral commerce.<sup>298</sup> Thus, if an examination of a ship's papers positively identifies the vessel and cargo, there is no right to search further. The vessel must be released.<sup>299</sup>

The belligerent vessel must clearly announce its intention to visit and search as a belligerent right. The right only applies during war. An attempt to visit and search during peacetime is piracy.<sup>300</sup> If a belligerent determines that it has probable cause to take a vessel in for further examination, it must take the vessel into one of its own ports; it may not take the vessel into a neutral port.<sup>301</sup> Finally, the right to visit and search must be exercised on the high seas; it may not be carried out in neutral waters.<sup>302</sup>

Not only is the right to visit and search not an absolute right, it is also a right which may be very impractical. A vessel conducting visit and search is extremely vulnerable to air or submarine attack. While conducting visit and search, the vessel is in a relatively helpless position in the water.<sup>303</sup> The complexity and size of cargoes make it difficult to effectively conduct visit and search, especially where destinations may be unclear.<sup>304</sup> The result may be that the neutral vessel has to be taken in for further examination, an expensive and timely proposition for all concerned. Finally, in some cases naval intelligence may have already revealed the true identity of a vessel and its cargo, making the visit and search little more than pro forma.<sup>305</sup> For these reasons, alternatives to visit and search have been utilized.

## B. ALTERNATIVES TO VISIT AND SEARCH

The United States has traditionally tried to limit the power to visit and search. In World War I the United States position was that the right to visit and search did not apply unless there was sufficient evidence to justify a belief that contraband was on board.<sup>306</sup> It was the United States further position that the results of the search at sea bound the belligerent.<sup>307</sup> There was no right to take vessels in for further examination. It was either carrying contraband cargo or it was not. The British opposed the United States system;<sup>308</sup> the Germans compromised by permitting the United States to ship goods in neutral convoy.<sup>309</sup>

The primary alternatives to visit and search are the navicert and the neutral convoy. The navicert is a document that a belligerent official issues to a neutral vessel at its departure certifying either that the cargo is not bound for the opposing belligerent, or that the vessel has no contraband on board.<sup>310</sup> The purpose of the navicert is to guarantee a cargo's neutral purpose with minimal interference.<sup>311</sup> If circumstances change, the navicert loses its validity.<sup>312</sup>

The neutral convoy is a grouping together of neutral merchant ships under the escort of protecting neutral warships.<sup>313</sup> Belligerent vessels are not supposed to visit and search these ships because the word of the sovereign has been implicitly given that the cargo is neutral, and respect for neutral nations

dictates that this word should be taken at face value.<sup>314</sup> During World War II, the United States used what was misleadingly called a modified navicert system in which Allied naval authorities approved cargoes, routes and destinations of neutral vessels.<sup>315</sup>

The United States is using the neutral convoy system for the re-flagged tankers in the Persian Gulf. The Iranians have not asked to visit and search these vessels,<sup>316</sup> but if they did, the American position would be that United States escorts would certify the lack of contraband.<sup>317</sup> It is the United States' position that neutral merchant vessels under convoy of neutral warships are exempt from visit and search, because the word of the United States is at stake and should be accepted absent some reasonable suspicion that the certification is erroneous.<sup>318</sup>

It is not certain whether the Iranians would accept a United States certification for lack of contraband.<sup>319</sup> It is possible, however, that they might ask to visit and search. The Iranians have conducted visit and search in the Persian Gulf before.<sup>320</sup> Iran's visit and search of a Soviet arms carrier led to an increased Soviet presence in the Gulf, and was thus in part a catalyst for re-flagging.<sup>321</sup> The Iranians have even conducted a visit and search of an unescorted American merchant vessel, the President Taylor.<sup>322</sup>

The question whether Iran would accept a United States certification goes to the heart of the issue of good faith neutrality. A fair argument can be made that Iran should have the right to verify the lack of contraband on the re-flagged vessels. It is a matter



of self-preservation for Iran. A similar self-preservation issue exists for the United States in another context. As much as the United States hopes that the Soviet Union will comply with future missile reduction treaties, the way to reduce suspicion and ease tension is through mutual verification. The situation here, albeit less serious than a nuclear weapons treaty, is similar. The United States publicly stated before the arms-for-hostages deal that it would never sell arms to either belligerent, then it sold arms to Iran. If the United States really wants to have its neutrality respected, it ought to be willing to let the belligerents verify it.

Despite the firm United States position that certification should be accepted, the point is not settled in international law. The British have always contested the validity of neutral convoy and certification.<sup>323</sup> The argument against sailing with convoy is that it is inconsistent with neutrality. It manifests an intent to defend by force what is supposed to be a peaceable shipment of cargo. The belligerent permits neutral commerce, but then is confronted with an armed escort. Naturally, the belligerent must wonder why an armed escort is necessary, if the neutral vessel is complying with the law of war at sea.<sup>324</sup>

Neutral convoys with certified national guarantees are probably too much of a concession for a belligerent. The question can come up whether cargo is contraband, and the belligerent should ultimately be able to make the determination. It takes away the belligerent's protection from fraudulent certification, allowing the neutral to determine for itself in advance

whether cargo may be shipped or not. The national certification process emasculates the belligerent's right to visit and search.<sup>325</sup>

#### C. VERIFICATION OF NEUTRAL CARGO IN THE PERSIAN GULF

The United States Navy's rules of engagement in the Persian Gulf are relatively straightforward. Re-flagged tankers get the same protection that ordinary United States flagged commercial vessels receive.<sup>326</sup> This protection means that United States aircraft or warships will defend against air or surface threats whenever hostile intent or a hostile act occurs.<sup>327</sup> A hostile act is defined as launching a missile, shooting a gun, or dropping a bomb towards a United States ship.<sup>328</sup> Hostile intent is the threat of imminent use of force against friendly forces. It includes radar lock-on with guided missiles, and maneuver into position where an effective hostile act could take place.<sup>329</sup> The rules of engagement are based on the inherent right of self-defense.<sup>330</sup>

The United States says that it will certify lack of contraband if Iran asks for the right to visit and search.<sup>331</sup> The United States is not sure whether the Iranians will accept this certification.<sup>332</sup> If the Iranians do not accept the certification, but move in to conduct visit and search, they will also be within the range specified as denoting hostile intent. Under the rules of engagement then, the United States Navy could defend with force. It is unclear whether the Navy would actually use force against an Iranian vessel

attempting visit and search. Undoubtedly, there would be warnings first. Probably, permission from the National Command Authority would be required. But that is not the point. The point is that an escalation of tension with the concomitant risk of conflict would have taken place needlessly.

The better solution is to put the ball back in Iran's court, by offering it the opportunity to use navicerts.<sup>333</sup> The first step would be to inform the Iranians that the United States plans to certify its neutral convoys unless Iran objects. If Iran does not reply, its right to visit and search should not apply. This analysis is consistent with the notion that the right to visit and search is not the right to vex and harass neutral shipping. The right to visit and search is only a matter of self-preservation if the belligerent treats it that way at the outset. Otherwise, the right to visit and search serves only as a tool to annoy third party nations. If the Iranians object, the United States should offer to let them use navicerts, and have the Iranians certify lack of contraband before the vessels return to Kuwait. This option eliminates any Iranian grounds for suspicion. Although it may be a slight commercial inconvenience, the dividends it reaps politically in terms of demonstrating the United States' good faith attempts to remain neutral should more than make up for the inconvenience.

What Iran has apparently not realized, however, is that the right to visit and search should not apply when the tankers are leaving Kuwait full of oil. Iran has said that oil leaving Kuwait falls under the rule of contraband.<sup>334</sup> It does not. Contraband pertains to

goods imported into a belligerent, not exported out of it. If Kuwait is a belligerent, then Iranians may capture any cargo coming out of Kuwait, contraband or not. If, as has been maintained here,<sup>335</sup> Kuwait is still neutral, then Iran should have no right to visit and search. The destination of the oil will plainly not be Iraq. This fact is discernible from the route the tankers follow. Thus, Iran would violate the rule that visit and search may not be accomplished where less obtrusive actions are sufficient to guarantee neutral shipping.

The right to visit and search should only apply when the vessels are on their way back to Kuwait. This visit and search should actually be accomplished with relative ease. The re-flagged tankers will take their oil to neutral countries, or offload to other tankers outside the Gulf, then immediately return to Kuwait with only ballast aboard and no cargo.<sup>336</sup> Because the vessels will be basically empty, Iranian navicerts should be largely a formality. It may even be a formality the Iranians will waive, but it is a formality which should be granted nevertheless, in the interests of good faith assurances of United States neutrality.

D. UNITED STATES OPTIONS IF IRAN ABUSES THE RIGHT OF VISIT AND SEARCH

Absent changed circumstances, an attempt by Iran to visit and search after Iranian navicerts should be regarded as a hostile act or hostile intent, and should be responded to under the inherent right of self-

defense.<sup>337</sup> The presumption in that case should be that Iran has no need to visit and search; its only goal is harassment, or more insidiously, to attack while United States vessels are in a less than "general quarters" condition.<sup>338</sup> Officers purporting to conduct visit and search could in fact be saboteurs. These concerns undoubtedly manifested themselves in the United States decision to certify neutral convoys, if asked. The navicert system is at least as secure.

Civil liability theoretically could provide a further remedy if the Iranians attack the re-flagged vessels or any other neutral shipping. Precedent for this option came from the Falklands War. In Amerada-Hess Shipping Corporation and United Carriers, Inc. v. Argentina [hereinafter Amerada],<sup>339</sup> the United States Court of Appeals for the Second Circuit held that the Foreign Sovereign Immunities Act did not bar suit for a violation of international law. In Amerada, Argentinian aircraft attacked a neutral Liberian-flagged but United States owned vessel en route from the Virgin Islands to Alaska to pick up oil. The attack took place outside the belligerents' exclusion zone and was undertaken without warning. The vessel ultimately had to be scuttled. After reiterating the right of a neutral ship to free passage on the high seas, the court endorsed visit and search as the method for verifying a ship's status, and concluded that Argentina violated international law.<sup>340</sup> The court then held that the district court had jurisdiction under the Alien Tort Statute, and that the Foreign Sovereign Immunities Act did not bar jurisdiction where a violation of international law had taken place rather

than a mere tort.<sup>341</sup> The Kuwaiti Oil Tanker Company could thus sue Iran in the United States, if re-flagged tankers were struck.<sup>342</sup>

#### VIII. NEUTRALITY AS A MISNOMER

The difficulty in deciding whether Kuwait is neutral stems in part from the changing nature of war and international relations. The literature speaks of belligerents and neutrals as if a nation always neatly fits into one or the other category. Occasionally, Kuwait is referred to as an ally of Iraq.<sup>343</sup> This description applies only very loosely to Kuwait and Iraq. Allies are nations that have formed an association by league or treaty for joint prosecution of a war or for mutual defense assistance.<sup>344</sup> Great Britain and the United States are allies under NATO. Kuwait and Saudi Arabia are allies under the GCC. Iraq and Kuwait are not allies in the technical sense of the word. They are not bound by treaty or alliance. Moreover, allies are considered belligerents only if they actively cooperate in the prosecution of the war.<sup>345</sup> This requirement is no more than the duty of neutrality in the first place. The "ally" description is probably not a useful or accurate one for Kuwait.

It has been suggested that perhaps the terms "neutral," "non-belligerent" and "third state" should be interchangeable, and should apply to all states that do not actually participate in hostilities.<sup>346</sup> Under this approach, all non-belligerent states are automatically neutral in all armed conflicts.<sup>347</sup> The term "neutral" just does not seem to fit in Kuwait's case.

Despite Kuwait's continued assistance to Iraq, and its clear desire that Iraq not be defeated, Kuwait gets to hide behind the neutrality shield. Kuwait gets to have it both ways. Nevertheless, under current practice, Kuwait can do exactly that. Perhaps Iran's lack of adherence to other nations' genuine neutrality reconciles this result in part.

Part of the problem arises from war's illegality under the United Nations Charter.<sup>348</sup> Under the Charter, neutrality is not always accommodated. An aggressor is identified, and the Security Council is empowered to authorize collective security actions that are binding on member states.<sup>349</sup> Self-defense is authorized only as an interim measure until a collective security force can be assembled.<sup>350</sup>

Iran wants the Security Council to make a determination that Iraq was the aggressor in the war.<sup>351</sup> Undoubtedly, this determination would lead to a more favorable resolution of the war's end for Iran. With the possible exception of North Korea in the Korean War, the Security Council has never identified an aggressor in conflicts after the Charter.<sup>352</sup> The problem stems in part from the Cold War.<sup>353</sup> The United Nations' inability to make this determination is representative of the problems which have arisen under the Charter. The realities of current international politics make it impossible in most cases to reach a consensus on who is at fault in a conflict. The United States failure to get a Security Council resolution to embargo arms shipments to Iran is yet another example of political reality thwarting the Charter's goal. Because of the pragmatic difficulties with implementing

the Charter, nations still elect to obtain a status of neutrality, not wishing to get involved with either side.

Another problem with the neutrality concept is the problem of weak nations unable to safeguard their neutrality. Cambodia and Laos were not neutral in the Vietnam War when they allowed North Vietnam to use their territory as supply depots, transportation lines, and safe havens. Yet, realistically there was little these nations could do about it. The neutrality paradox was apparent as both nations obviously rendered tremendous assistance to North Vietnam, but as neutrals were immune from United States attack.<sup>354</sup>

Economic power can also skew the neutrality concept. In the 1973 Yom Kippur War, Arab states were able to enforce neutrality on third party states through the threat of oil embargo. Israel had no similar threat, so while the Soviet Union and Eastern European nations continued to sell weapons to the Arab states, Western nations generally refused to sell to Israel.<sup>355</sup>

Perhaps the superpowers have a moral obligation to never be neutral in armed conflict. As much as the United States claims to be neutral in the Iran-Iraq war, the reality is that it cannot afford for either side to win. The United States does not want Iraq to win because Iraq has a repressive regime with a terrible human rights record. Iraq has traditionally been a Soviet protege, and the more Iraq wins the more Iran must turn to the Soviet Union for military support and overland export of its oil.<sup>356</sup> The United States cannot allow Iran to win, because Iran would then have



political hegemony in the Persian Gulf, and control over sixty-three percent of the world's oil reserves.<sup>357</sup> Regardless of whether the United States loses its neutrality, it probably will not allow either of these events.

Neutrality, then, continues to lead "a sort of 'juridical half-life'<sup>358</sup> suspended between an ideology which denies its premises and a reality which finds it useful, if not necessary."<sup>359</sup> Neutrality continues to remain a goal for nations to strive for in order to attain a modus vivendi with both belligerents. It is not, however, a status that weaker nations will necessarily have the power to maintain, nor is it a status that will prevent stronger powers from acting in their own perception of what is best for the world as a whole.

#### IX. CONCLUSION

The Iran-Iraq war is perhaps no closer to ending today than it was seven and a half years ago. As the re-flagging policy has helped in part to reduce the impact of the tanker war,<sup>360</sup> the belligerents have begun to carry the war more and more to metropolitan areas through long range missile attacks.<sup>361</sup> A possible arms embargo and growing political pressure on Iran could bring them to the bargaining table, but that prospect is not one to be counted on. The issues discussed in this article may retain vitality for some time.

The starting point for an analysis of the comparative rights and duties of the United States, Kuwait,

Iraq and Iran remains the determination of their belligerent or neutral status. The key to this designation is that a violation of neutrality alone is not tantamount to the end of neutrality. The United States has violated its neutrality in the war by selling arms to Iran, and by giving photographic intelligence and commodity credits to Iraq. Kuwait has violated its neutrality by financing Iraq, using its ports as transshipment points for cargo bound for Iraq, and perhaps by allowing Iraq to use its airspace. The act of re-flagging is not a neutrality violation by either the United States or Kuwait. Re-flagging provides indirect assistance to Iraq because it helps to insure the continued flow of oil from Kuwait, and hence insures that Kuwait will have the capability to finance Iraq. However, indirect assistance is usually not be a valid test for a violation of neutrality. In today's world, where what happens on the Japanese stock market may have profound effects on Wall Street, virtually any international action may have a ripple effect of some magnitude on the Iran-Iraq war. From the United States perspective, re-flagging was accomplished to block the Soviets and help a friendly nation, Kuwait, not to assist Iraq. Kuwait asked for re-flagging in order to protect itself from Iran. The residual effect of re-flagging is assistance to Iraq, but this cannot usefully be termed a violation of neutrality.

Although the United States and Kuwait have violated their neutrality in the war, they still retain their neutrality status. In official statements, even Iran continues to refer to Kuwait as a neutral nation

that has not strictly observed its neutrality.<sup>362</sup> Iran must affirmatively signal the end of the United States' or Kuwait's neutral status by either declaring war or taking hostile action tantamount to war. Iran probably could legally do this against Kuwait as a matter of self-defense in response to their continued financing of Iraq. Iran has taken hostile action against both nations in the form of tanker attacks, terrorism and sabotage. These hostile acts are not a sufficient signal in the hostile environment of the Persian Gulf in particular, and the Middle East in general. Tanker attacks and terrorism have been a way of life in the Persian Gulf for years now. Unless one chooses to say that Iran and Iraq are at war with the world, these action are not significant enough to terminate neutrality status. Kuwait and the United States remain neutral in the Iran-Iraq war. Nevertheless, Kuwait must realize that continued financial support of Iraq leaves Kuwait vulnerable to a legally justifiable act of war by Iran.

The designation is important for an analysis of the re-flagging decision in at least two ways. If Kuwait is a belligerent, then under the colorable transfer rule, Iran can ignore the switch in the tankers' nationality. The tankers remain Kuwaiti. Further, if Kuwait is belligerent, the Iranians may lawfully capture oil exported on these tankers out of Kuwait. They could legally destroy the tankers.

Conversely, if Kuwait is neutral, the tankers' switch in registry must be honored. Despite the fact that the Kuwaiti tankers are now flying modified American flags of convenience, they have met the

"genuine link" test, and are valid American flagged vessels. -The tankers meet the international law standards of American ownership, and compliance with United States domestic law. Just as importantly, Kuwait's neutral status severely limits what actions Iran can take with regard to the tankers. The right to visit and search neutral shipping for contraband to a belligerent does not extend to the export of oil from a neutral country to another neutral country. If there was suspicion that the Kuwaiti tankers were actually delivering oil or some other commodity to Iraq, the right to visit and search could apply. This argument is simply not a legitimate one when the tankers are leaving Kuwait going out of the gulf. The evidence is too strong that the tankers could not possibly be carrying contraband for Iraq. The cargo they carry, oil, is not one Iraq needs. The direction of navigation, out of the gulf, is away from Iraq. Finally, Iraq is blockaded, rendering direct access to Iraqi ports impossible. Any attempt by Iran to visit and search tankers leaving Kuwait is no more than an attempt to harass, and thus cannot be countenanced under the law of visit and search.

The opposite result is reached when the tankers are going back to Kuwait. Never mind that the United States has assured the world that the tankers will return in ballast, and are not configured to carry cargo other than oil. It does not matter whether there are easier, more practical ways to supply Iraq. These tankers could be carrying supplies for Iraq through Kuwait. Iran should be able to verify that they are not. That is a belligerent right.

Iran should be able to use the navicert system as a valid means of exercising this right. The United States should go further than simply saying it will certify the lack of contraband. It should permit Iran to verify for itself the lack of contraband. With the tankers in ballast, this verification could conveniently be conducted at sea prior to the tankers' reentry into the gulf. Iran should at least be invited to conduct the navicert action. Iran could waive the right, or exercise it. Regardless, the United States would have demonstrated its good faith effort to practice neutrality. After the navicert option is exercised, a subsequent Iranian attempt to visit and search vessels en route to Kuwait could more properly be classified as hostile. A self-defense response under those circumstances would be far more legitimate.

It is important for the United States to maintain efforts at good faith neutrality. If the United States expects to lead international efforts to end the war, it must continue to maintain its position as an honest broker. Iran could hardly be blamed for failing to accept at face value a United States cargo certification. After all, the United States said it would never sell weapons to either belligerent.

The United States has said that it accepts the Iranian revolution as a fact of history. The United States must have a normalization of its relationship with Iran as an ultimate goal. Strict observance of neutrality in the Persian Gulf is a necessary first step. Despite the United Nations Charter, neutrality continues to be an important international policy option. If the United States desires to continue this

option in the Iran-Iraq war, it must continue to do so in a straightforward and evenhanded way. Clear and decisive action rather than abstruse rhetorical guarantees is the best method of insuring legal consistency with the political goal of neutrality.

#### Footnotes

1. Rubin, Drowning in the Gulf, 69 Foreign Policy 120, 124 (1987).
2. The Santissima Trinidad, 20 U.S. (7 Wheat.) 283 (1822).
3. The Three Friends, 166 U.S. 1, 52 (1897).
4. 2 Oppenheim, International Law (7th ed., H. Lauterpacht 1952).
5. The Bermuda, 70 U.S. (3 Wall.) 514 (1865).
6. Daly, The Enduring Gulf War, Proc. Naval Rev., May 1985, at 148, 152.
7. Evans & Company, Iran-Iraq: Bloody Tomorrows, Proc. Naval Rev., January 1985, at 33, 34.
8. Id.
9. Id.
10. Id.
11. Id.
12. Renfrew, Who Started the War?, 66 Foreign Policy 98, 99 (1987).
13. Id. at 100.
14. Iran-Iraq: Treaty on International Borders and Good Neighborly Relations, June 13, 1975, 14 I.L.M. 1133 (1975); Evans & Company, supra note 7, at 34.
15. U.S. Dep't of State, U.S. Policy in the Persian Gulf, Special Rep. No. 166, July 1987, at 3 (hereinafter Special Rep. No. 166).
16. Id.
17. Id.
18. Rubin, supra note 1, at 121.
19. Special Rep. No. 166, supra note 15, at 3.
20. Rubin, supra note 1, at 121.

21. Evans & Company, supra note 7, at 34.
22. Khomeini has listed Hussein as one of his three mortal enemies. Hussein has vowed to rid the Persian Gulf of "that lunatic Khomeini." Evans & Company, supra note 7, at 33.
23. Renfrew, supra note 12, at 102.
24. Id. at 100.
25. Id.
26. Evans & Company, supra note 7, at 34.
27. Renfrew, supra note 12, at 102.
28. Evans & Company, supra note 7, at 33.
29. Id.
30. Id.
31. Renfrew, supra note 12, at 103.
32. Evans & Company, supra note 7, at 122.
33. Rubin, supra note 1, at 122.
34. Although it is still possible that Iran could win the war, Iraq (1) has strong defensive positions, (2) imports all the arms it needs, and (3) exports oil overland through Turkey and Saudi Arabia to finance its war effort. Rubin, supra note 1, at 127.
35. Id.
36. Mlyroie, The Superpowers and the Iran-Iraq War, 21 Am. Arab Aff. 15, 24 (1987).
37. Rubin, supra note 1, at 127.
38. Id.
39. Id. at 129.
40. Special Rep. No. 166, supra note 15, at 10.
41. Charlottesville Daily Progress, Jan. 6, 1988, at 2, col. 1.



42. As early as October 1980, Iranian President Hojatolislam Ali said, "We are determined to send Saddam to hell. His collaborators' turn will come later. I am referring to the shaykhs in the Gulf region [whose] governments have supported unbelief against Islam." Rubin, supra note 1, at 128-129. Iranian officials have also said that if Kuwait continues to support Iraq, Iran will directly attack Kuwait with missiles. Foreign Broadcast Information Service, Near East and South Asian Edition, July 28, 1987 at S2.
43. Jaber, Kuwait in the Firing Line, 306 Middle E. Int'l 5 (August 8, 1987).
44. As of 1984, the combined aid to Iraq from all members of the Gulf Cooperation Council (including Saudi Arabia, Kuwait, Bahrain, Qatar, Oman and the United Arab Emirates) totalled an estimated thirty-five billion dollars. Anthony, The Gulf Cooperation Council, 28 Orbis 447 (1984). The financial aid is apparently still coming in. Teheran radio reported that on December 16, 1987 Kuwait gave Iraq two billion dollars for the war. Foreign Broadcast Information Service, Near East and South Asian Edition, December 16, 1987, at 52-53. Kuwait has also served as a transshipment point, although it is not certain what goods are shipped through Kuwait to Iraq. U.S. Dep't of State, U.S. Policy in the Persian Gulf and Kuwaiti Reflagging, Current Policy No. 978, June 1987, at 2 (hereinafter U.S. Policy in the Persian Gulf and Kuwaiti Reflagging). One commentator states that the Soviet Union may ship some weapons through

Kuwait to Iraq. Telephone interview with Professor Laurie Mlyroie, Harvard University, Assistant Professor of Government (February 1, 1988). There remains no reported direct evidence of weapons transshipments through Kuwait. The port is open to cargo bound for Iraq pursuant to a 1972 agreement. Special Rep. No. 166, supra note 15, at 11. Kuwait claims it only gives food and medical supplies to Iraq. Foreign Broadcast Information Service, Near East and South Asian Edition, 30 July 1987, at J1.

- 45. Special Rep. No. 166, supra note 15, at 11.
- 46. Id. One commentator has suggested that Kuwait went to the Soviet Union first because of suspicions over United States motivations aroused by the Iran-Contra affair. Mlyroie, supra note 36, at 22. Still another author has suggested that the real reason Kuwait asked for protection was to get both superpowers to intervene to end the war. Rubin, supra note 1, at 130. In addition to direct pressure on Kuwait, there was also concern about the general trend of events in the Persian Gulf. By late 1986 Iran had acquired Chinese-origin Silkworm antiship missiles. Moreover, attacks on shipping in the gulf had doubled from 1985 to 1986 and continued to increase in 1987. Special Report No. 166, supra note 15, at 10.
- 47. Special Rep. No. 166, supra note 15, at 11.
- 48. Id.
- 49. Id. Of these reasons, it seems almost certain that the Soviet factor was the most important. "It has become abundantly clear that the real

reason for re-flagging the Kuwaiti tankers is to counter Soviet incursions into the Gulf." Kuwaiti Tankers, Hearings Before the Committee on Merchant Marine and Fisheries, 100th Cong., 1st Sess. 1 (1987) [hereinafter Hearings] (statement of Rep. Walter B. Jones). Oil flow has been basically unimpeded. The percentage of ships attacked before the re-flagging was only one percent. Iran has too much to worry about with Iraq to attempt any broad intervention in GCC nations. Special Rep. No. 166, supra note 15, at 10.

50. Washington Post, Jan. 24, 1988, at A24, col. 1.
51. Special Report No. 166, supra note 15, at 11.
52. Black's Law Dictionary 939 (5th ed. 1979).
53. Oppenheim, supra note 4, at 686.
54. Id. at 687.
55. Id. at 698.
56. Id. at 743.
57. Id. at 751.
58. Black's Law Dictionary 141 (5th ed. 1979).
59. Id.
60. Oppenheim, supra note 4, at 673-766.
61. Oppenheim, supra note 4, at 752.
62. Id. at 753.
63. U.N. Charter art. 51.
64. Text accompanying Notes 140-142 infra.
65. Norton, Between the Ideology and the Reality: The Shadow of the Law of Neutrality, 17 Harv. Int'l L.J. 249, 251 (1976).
66. U.S. Policy in the Persian Gulf and Kuwaiti Re-Flagging, supra note 44, at 2.
67. Id.

68. Oppenheim, supra note 4, at 743.
69. Kuwait has 12,400 men in its Army, and although it has 160 British Chieftain tanks, the crews are comprised of unreliable Bedouin soldiers. At the start of the war Iraq had 220,000 soldiers, Iran 415,000. McNaughton, Arms and Allies on the Arabian Peninsula, 28 Orbis, 495, 507 (1984).
70. The assistance has apparently paid off. Since Iran's successful counterattack in 1982, there have been no significant line changes. Iraq holds strong defensive positions, is able to export oil through pipelines in Turkey and Saudi Arabia, and imports all the weapons it needs from the Soviet Union and other sources. Rubin, supra note 1, at 128. Iraq is not ready to capitulate, but has indicated a willingness to negotiate for peace.
71. S. Rep. No. 102, 100th Cong., 1st Sess. 3 (1987). U.S. Policy in the Persian Gulf and Kuwaiti Re-Flagging, supra note 44, at 3. Rubin, supra note 1, at 133.
72. U.S. Policy in the Persian Gulf and Kuwait Re-Flagging, supra note 44, at 3.
73. J. A. Hall, The Law of Naval Warfare, 211-23 (1921). C. John Colombos, The International Law of the Sea, 633-657 (1962). Julius Stone, Legal Controls of International Conflict, 478-491 (1954).
74. The principle that neutrals are forbidden to serve as transshipment points for weapons bound for belligerents was reiterated in the Yom Kippur War of 1973. West Germany, Spain and most other NATO states refused to serve as stopover points for

weapons bound from the United States to Israel. Arab states had threatened an oil embargo against the transshipment states. The right to employ economic sanctions in this type of case is recognized international law. In contrast, the Soviet Union and Eastern Europe continued to supply the Arab states. Israel had no economic weapon to force these countries to adhere to their neutrality. Norton, supra note 65, at 295-96.

75. Mlyroie, supra note 36, at 24.
76. The Iranians have complained to United Nations Secretary General Javier Perez de Cuellar about this. Foreign Broadcast Information Service, Near East and South Asian Edition, January 12, 1988, at 33, J1. Kuwait denies this allegation. Foreign Broadcast Information Service, Near East and South Asian Edition, July 30, 1987, at J1.
77. Oppenheim, supra note 4, at 688-690.
78. Although Kuwait has stated that its only desire is noninterference in the conflict, it nevertheless blames Iran for prolonging the conflict, and justifies its support for Iraq as support for the Arab regime. Foreign Broadcast Information Service, Near East and South Asian Edition, July 20, 1987, at J1. The State Department acknowledges Kuwait's support for Iraq. "Kuwait . . . supports Iraq politically and economically." Special Rep. No. 166, supra note 15, at 3.
79. Oppenheim, supra note 4, at 655.
80. Iraq used Kuwaiti cash in part to buy French weapons from 1983-1986 when France was Iraq's biggest weapons supplier. France has ceased this

practice due to fears of Iranian terrorism and concerns about Iraq's liquidity. Mlyroie, supra note 36, at 25.

81. U.S. Policy in the Persian Gulf and Kuwaiti Reflagging, supra note 44, at 2.
82. Grumman, The Iran-Iraq War: Islam Embattled, 92 The Wash. Papers 54 (1982). Iraq made major military threats against Kuwait from 1961-1963 and again from 1973-1976. Anthony, supra note 44, at 518.
83. Hall, supra note 73, at 137.
84. Mlyroie, supra note 36, at 25.
85. Special Rep. No. 166, supra note 15, at 12.
86. The arms-for-hostages deal was first revealed on November 3, 1986 in the pro-Syrian Lebanese publication, Al Shiraa. Hunter, After the Ayatollah, 66 Foreign Policy 77 (1987). Rubin, supra note 1, at 123. Mlyroie, supra note 36, at 21. Compare the statement given by Richard W. Murphy, Assistant Secretary for Near Eastern and South Asian Affairs, before the Subcommittee on Europe and the Middle East of the House Foreign Affairs Committee on January 28, 1986: "The United States is neutral in the conflict, and we are not considering changing that policy. We have a firm policy of not supplying war-making material to either Iran or Iraq." U.S. Dep't of State, Review of Developments in the Middle East, Current Policy No. 786, January 1986, at 3 (hereinafter Current Policy No. 786).
87. Mlyroie, supra note 36, at 21.

88. Id. Stalemate in the Gulf War: Iran-Iraq 1985, 117 The Army Q. and Def. J. 177 (1987).
89. Rubin, supra note 1, at 123.
90. Id.
91. Mlyroie, supra note 36, at 21.
92. U.S. Dep't of State, U.S. Security Arrangements in the Persian Gulf, Gist, July 1987, at 1.
93. The Soviet Union supplies Iraq with weapons while it concomitantly permits Bulgaria, East Germany and Rumania to supply arms to Iran. Rubin, supra note 1, at 128. U.S. Military Forces to Protect "Re-Flagged" Kuwaiti Oil Tankers, Hearings Before the Committee on Armed Services, United States Senate, 100th Cong., 1st Sess. 49 (1987) [hereinafter Hearings] (statement of Michael H. Armacost, Under Secretary of State for Political Affairs). North Korea and China also supply weapons to Iran. Id. Not only are United States businesses enjoined from selling weapons to Iran; in addition, on October 29, 1987 the President proscribed the sale of fourteen other broad categories of dual-use items. The President's Executive Order further prohibits any imports from Iran. Operation Staunch has apparently reduced the flow of weapons to Iran from other Western sources. In 1984, twenty-three Western nations sold arms worth over a billion dollars to Iran. In the first half of 1987, only four Western nations sold Iran arms, valued at less than 200 million dollars. Assistant Secretary of State Richard W. Murphy, Testimony Before the Subcommittee on Arms Control, International Security and Science 9 (December 15,

- 1987) (hereinafter Murphy). The Iranians apparently find this shift in American policy amusing. "One day [the United States] sends us cake, and another day it threatens us with bombs and missiles." Iran's Deputy Foreign Minister Mohammad Javad Larijani made this statement on June 28, 1987. Rubin, supra note 1, at 131.
94. The United Nations Security Council Resolution Calling for an Immediate Cease Fire, July 20, 1987, 26 I.L.M. 1479 (1987). Special Rep. No. 166, supra note 15, at 3, 12.
95. Special Rep. No. 166, supra note 15, at 3, 12.
96. Mlyroie, supra note 36, at 21.
97. Id.
98. Special Rep. No. 166, supra note 15, at 1-12.
99. Washington Post, October 20, 1987, at A1, col. 4.
100. Washington Post, October 20, 1987, at A26, col. 3.
101. Chaze, Waiting for Iran, U.S. News and World Report, October 5, 1987, at 22.
102. Id.
103. Id.
104. Washington Post, October 17, 1987, at A1, col. 2.
105. Id.
106. Id.
107. Washington Post, October 20, 1987, at A26, col. 5.
108. Washington Post, October 20, 1987, at A27, col. 2.
109. Washington Post, supra note 107, at A26, col. 1.
110. Id.
111. Id. at col. 6.
112. Id. at col. 2.
113. Washington Post, supra note 108, at A27, col. 1.
114. New York Times, January 18, 1988, at A6, col. 1.



115. Washington Post, October 17, 1987, at A1, col. 2.
116. Special Rep. No. 166, supra note 15, at 11.
117. Id. at 5.
118. Id.
119. Id.
120. Political rhetoric can always be manipulated so that tangible acts appear more consistent with neutrality.
121. Special Rep. No. 166, supra note 15, at 3.
122. The real impetus for United States buildup in the Gulf was the fall of Afghanistan and the Shah's departure from Iran.
123. Special Rep. No. 166, supra note 15, at 7.
124. Documentation and Measurement of Vessels, 46 C.F.R. § 67 (1986).
125. Hearings, supra note 49, at 252 (additional questions submitted by the committee and answers from U.S. Coast Guard.)
126. Special Rep. No. 166, supra note 15, at 11. For an interesting debate on the possibility of Iran asking for its vessels to be re-flagged, see Hearings, supra note 49, at 50 (statements of Rep. Studds and Edward W. Gnehm, Deputy Assistant Secretary of Defense, Near Eastern and South Asian Affairs, Department of Defense).
127. Douglas v. Seacoast Products, Inc., 431 U.S. 265, 299 (1977). Hearings, supra note 49, at 17 (statement of Rep. Bentley).
128. R. C. Craig Ltd. v. Ships of Sea, Inc., 345 F. Supp. 1066, 1070 (S.D. Ga. 1972). Special Rep. No. 166, supra note 15, at 11.
129. Special Rep. No. 166, supra note 15, at 3.

130. Id.
131. Id.
132. Id. at 9.
133. Hearings, supra note 49, at 70 (statement of Marion Creekmore, Deputy Assistant Secretary of State, Near Eastern and South Asian Affairs, Department of State).
134. Id. at 69.
135. Most of these vessels fly Panamanian, European or Liberian flags of convenience. Hearings, supra note 93, at 97 (statement of Senator Kennedy).
136. Id.
137. Id.
138. Admittedly, the overall rate for gulf shipping is about one percent. Id. at 87 (statement of Richard L. Armitage, Assistant Secretary of Defense for International Security Affairs.)
139. Typical of Kuwait's desire not to anger Iran, Kuwait continues to describe the re-flagging as a commercial operation only. Shaykh Sabah al-Ahmad al-Jabir, Kuwait's Minister of Foreign Affairs, opined that the decision to re-flag was only a commercial decision based only on "a belief in peace." The minister continued to stress Kuwait's noninterference in the conflict, and said that it was up to the United States to protect the re-flagged tankers and was not a Kuwaiti concern. Foreign Broadcast Information Service, Near Eastern and South Asian Edition, July 20, 1987 at J1-2. The Kuwaiti reaction after the United States shelled the Iranian oil platform in October 1987 was consistent, as officials stated that the

attack did not concern Kuwait in any way.

Washington Post, October 20, 1987, at A27, col. 1.

140. Mlyroie, supra note 36, at 26.

141. Murphy, supra note 93, at 9.

142. Japan has asked its oil companies to reduce imports from Iran by one-third. Wall Street Journal, December 28, 1987, at 10, col. 1.

143. Special Rep. No. 166, supra note 15, at 11. Telephone interview with Arthur Berger, Near East Bureau, Department of State (Jan. 3, 1988).

144. Id.

145. U.N. Convention on the Law of the Sea, December 10, 1982, art. 98, 21 I.L.M. 1288 (hereinafter U.N. Convention on the Law of the Sea). Berger, supra note 143. The humanitarian duty justified United States assistance to a Norwegian oil tanker set ablaze by the Iranians. Wall Street Journal, December 24, 1987, at 1, col. 3. There is support for an argument that the United States does not have the right to protect Kuwait. "The question of the proper maintenance of its neutrality is one for the neutral and belligerent states concerned only; other neutral states have neither the right nor the duty to interfere to assist the weak neutral against either belligerent, even if they have adequate forces available on the spot at the time when any violation takes place, although possibly they might be justified in giving assistance if requested by the government of the neutral State affected." Hall, supra note 73, at 139. (Emphasis added.) In conjunction with this principle, the United States did not intervene in

World War I to require South American nations to enforce their neutrality against the Germans. Of course, the distinction here is that Kuwait asked the United States for assistance.

146. Christian Science Monitor, January 21, 1988, at 7, col. 4.

147. Mlyroie, supra note 36, at 25. Special Rep. No. 166, supra note 15, at 11.

148. Berger, supra note 143. Secretary Weinberger made this point after the Iranian attack on the Sea Isle. Washington Post, October 18, 1987 at A34. Special Rep. No. 166, supra note 15, at 6. It costs thirty million dollars a month just to protect the eleven Kuwaiti tankers. Wall Street Journal, December 29, 1987, at 44, col. 1. There have been some notable exceptions to this policy. The United States escorted Liberian and Japanese tankers on January 2, 1988. CBS Nightly News, January 5, 1988. An exception was granted for a Bahraini flagged ship carrying United States foreign military sales items bound for Bahrain. Washington Post, November 12, 1987, at 1, col. 5. Nevertheless, the official policy is not to protect this shipping. The Department of Defense recently denied the Commander of U.S. forces in the Middle East, Rear Admiral Bernsen's, request to protect other neutral shipping. Washington Post, November 12, 1987 at A31, col. 1. Given that less than one percent of gulf shipping is attacked, oil prices are steady, and insurance rates stable, there seems little economic justification for an expanded role. Hearings, supra note

- 93, at 35 (statement of Michael H. Armacost, Under Secretary of State for Political Affairs.)
149. Hearings, supra note 93, at 35.
150. Id. at 34.
151. Id.
152. Oppenheim, supra note 4, at 672.
153. Special Rep. No. 166, supra note 15, at 11.
154. Id. For example, after the oil platform attacks, Iranian Ambassador Said Rajoi Khorassani called the United States action "all out war against my country." Washington Post, October 20, 1987, at A1, col. 14. The acts were described as all out war against which Iran would retaliate. Id. at 27, col 1.
155. Oppenheim, supra note 4, at 753.
156. Norton, supra note 65, at 252.
157. The tanker war has produced hostile action toward numerous states not direct parties to the conflict. A few examples follow: Iraq started the tanker war, hitting a Greek vessel carrying oil from Iran in March 1984. Hearings, supra note 93, at 22 (statement of Sen. Sam Nunn, Chairman, Committee on Armed Services). The Iranians hit a Japanese tanker in November 1987. Washington Post, November 12, 1987, at A25, col. 5. They attacked a Soviet merchant vessel on May 6, 1987. Special Rep. No. 166, supra note 15, at 5. They attacked a Norwegian oil tanker in December 1987. Wall Street Journal, December 14, 1987, at 1, col. 3. United States vessels flying foreign flags of convenience were especially hard hit. There were five major attacks on these vessels from the

middle of August 1987 to the end of the year. Wall Street Journal, December 29, 1987, at 44, col. 1. These attacks caused Exxon to switch its flags to Bermuda in order to get British protection. Id. Iranian speedboats attacked a Danish tanker bound for Saudi Arabia in January 1988. Washington Post, January 24, 1988, at A24, col. 1. In the same month, Iraq bombed and set ablaze a Cypriot flagged ship carrying Iranian oil. Wall Street Journal, January 13, 1988, at 1, col. 3. In all, there were 167 attacks on neutral shipping in the gulf during 1987, up fifty percent from 1986. Wall Street Journal, January 19, 1988, at 1, col. 3.

158. The following dialogue between Representative William J. Hughes and Marion Creekmore, Deputy Assistant Secretary of State, Near Eastern and South Asian Affairs, perhaps best capsulizes this position:

"Mr. Hughes. The fact of the matter is that the world, perhaps with the exception of the State Department, understands that Kuwait is not neutral, they in fact have been supporting Iraq in this war. Now, that is a fact. Everybody knows that.

Mr. Creekmore. But does that mean that every Arab country that is providing some support for Iraq is therefore a belligerent on the side of Iraq and that every country that is supporting Iran through whatever manner is a belligerent? I don't think so. I think that there are two belligerents in that war: Iran and Iraq." Hearings, supra note

49, at 73.

159. United States officials have stated that "these vessels become American ships subject to American laws." Special Rep. No. 166, supra note 15, at 11.
160. "Under the present circumstances, the oil transported in Kuwaiti vessels, regardless of the flags they are flying, falls under the rule of contraband cargo. . . . Contrary to what U.S. officials have claimed, Kuwaiti oil tankers flying U.S. flags are, in reality, carrying oil for the aggressor Iraqi regime." Foreign Broadcast Information Service, Near Eastern and South Asian Bureau, July 23, 1987, at 51 (statement of Iranian Foreign Minister Ali Akbar Velayoti).
161. Laritzen v. Larsen, 345 U.S. 571, 584 (1952).
162. Id.
163. Puamier v. Barge BT 1793, 395 F. Supp. 1019, 1030 (E.D. Va. 1974). In the United States, a principal benefit is the protection of the United States Navy. Special Rep. No. 166, supra note 15, at 11.
164. U.N. Convention on the Law of the Seas, supra note 140, art. 91 at 1287.
165. Hall, supra note 73, at 250.
166. Id.
167. Executive Report No. 5--Law of the Sea Conventions, 106 Cong. Rec. 11189, 11190 (86th Cong., 2d Sess., May 26, 1960). The United Nations Conference on Conditions for Registration of Ships drafted a convention designed to define "genuine link" in 1986. United Nations: Convention on Conditions for Registration of Ships [hereinafter

- Draft Convention], 26 I.L.M. 1229 (1987)].
168. Id.
169. Id.
170. Id.
171. The draft convention specifically reiterates this principle. Draft Convention, supra note 165, at 1236.
172. Id. at 1239.
173. Id.
174. Id. at 1240.
175. Secretary of Defense Caspar W. Weinberger, A Report to the Congress on Security Arrangements in the Persian Gulf [hereinafter Security Arrangements in the Persian Gulf], reprinted in 26 I.L.M. 1434, 1451 (1987).
176. Vessel Documentation Act of 1980, Pub. L. No. 96-594, 94 Stat. 3453 (codified as amended at 46 U.S.C. §§ 12101-12122 (1982)).
177. Security Arrangements in the Persian Gulf, supra note 175, at 1450.
178. Under traditional customary international law the standards are even more lenient. States are completely free to determine for themselves whether to grant flags to merchant vessels. The only exceptions are (1) treaty provisions, (2) prior grant of nationality by another state and (3) nationality may not be given to a ship when there is reasonable suspicion the ship will be used for a purpose violative of international law. Boleslaw Bozcek, Flags of Convenience, 105-106 (1962).



179. Hearings, supra note 49, at 104 (statement of Mr. Mark P. Schlefer, representing Chesapeake Shipping, Inc.).
180. Id.
181. Id. at 105. Moreover, the Kuwait Oil Tanker Company is a wholly owned subsidiary of Kuwait Petroleum Corporation, owned by the Government of Kuwait. Id. at 107.
182. Id. at 91 (statement of Rep. Hughes).
183. Vessel Documentation Act, 46 U.S.C. 12102(a)(4) (1983).
184. Hearings, supra note 49, at 180 (statement of Mr. John Gaughan, Administrator, Maritime Administration).
185. Vessel Documentation Act, 46 U.S.C. 12102(a)(4).
186. Id.
187. Hearings, supra note 49, at 89. Note, however, that the Chief Executive Officer's address is in Kuwait. Id. at 104.
188. Vessel Documentation Act, 46 U.S.C. 8103(a).
189. Vessel Documentation Act, 46 U.S.C. 8103(b).
190. Vessel Documentation Act, 46 U.S.C. 8103(e).
191. Security Arrangements in the Persian Gulf, supra note 175.
192. Both the Chairman of the House Committee on Merchant Marine and Fisheries as well as the President of the Seafarers International Union share this view. Hearings, supra note 49, at 108-109 (statements of Chairman Walter B. Jones and Mr. Frank Drozak).
193. Hearings, supra note 49, at 251.
194. Id.

195. Wall Street Journal, December 29, 1987, at 44, col. 1.
196. Id.
197. Hearings, supra note 49, at 16. (Statement of Rep. Bentley). Security Arrangements in the Persian Gulf, supra note 175, at 1450. Merchant Marine Act of 1936, C. 858, 49 Stat. 1985 (codified as amended at 46 App. §§ 1101-1295)).
198. Hearings, supra note 49, at 17 (statement of Rep. Bentley).
199. Inspection Requirements--foreign vessels, 46 C.F.R. § 2.01-13 (1987).
200. Security Arrangements in the Persian Gulf, supra note 175, at 1450.
201. The waiver was granted pursuant to the Act of Dec. 27, 1950, ch 1155 §§ 1, 2, 64 Stat. 1120, which reads in part, "The head of each department or agency responsible for the administration of the navigation and vessel inspection laws is directed to waive compliance of such laws upon the request of the Secretary of Defense to the extent deemed necessary in the interests of national defense by the Secretary of Defense." The Deputy Secretary of Defense requested the waiver on May 14, 1987. Hearings, supra note 49, at 146. The Coast Guard commandant granted it on May 29, 1987. Id. at 83 (statement of Admiral Kime).
202. Hall, supra note 73, at 250.
203. The Benito Estenger, 176 U.S. 568, 578-579 (1899). Justice Story first stated the rule in the United States. "In respect to the transfers of enemies' ships during war, it is certain that purchases of

them by neutrals are not, in general, illegal; but such purchases are liable to great suspicion; and if good proof be not given of their validity by a bill of sale and payment of a reasonable consideration, it will materially impair the validity of a neutral claim. . . . Anything tending to continue the interest of the enemy in the ship vitiates a contract of this description altogether." Id. (quoting Story, Notes on the Principles and Practice of Prize Courts (Pratt's ed.) 63, 2 Wheat App. 30 (1817)).

204. Id.

205. Id.

206. There is no United States equity interest in the vessels. Hearings, supra note 49, at 75 (statement of Rep. Hughes). Kuwait Oil Tanker Company owns all of the shares of Chesapeake. Id. at 105 (statement of Mr. Schlefer). As to the prong of the colorable transfer test pertaining to control, note this exchange:

"Mr. Bateman. So Chesapeake is in a sense an extension of the Government of Kuwait?

Mr. Schlefer. It is controlled by the Government of Kuwait, that is true." Id. at 107.

207. Text accompanying notes 152-160 supra.

208. Hall, supra note 73, at 231.

209. Id. at 249.

210. Id. at 251.

211. Id. at 252.

212. Id.

213. Id. at 261.

214. Special Rep. No. 166, supra note 15, at 11.

215. Id.
216. Hearings, supra note 49, at 107.
217. The result is the same even if the vessels are United States vessels rather than Kuwaiti vessels. Both nations are neutral under this scenario.
218. Herrerra v. United States, 222 U.S. 558 (1911).
219. The William Bagaley, 72 U.S. (5 Wall.) 377 (1866).
220. McDougal and Feliciano, Law and Minimum World Public Order, 488 (1961).
221. Id. at 481-487.
222. Id. at 488.
223. Security Arrangements in the Persian Gulf, supra note 175, at 1458. Beyond United States assurances that these tankers will not carry contraband to Iraq via Kuwait, practically speaking, the tankers are not suited for carrying contraband. They were built for carrying oil. Telephone interview with Captain Richard D. Debobes, U.S. Navy, Legal Advisor and Legislative Assistant to the Chairman, Joint Chiefs of Staff (January 21, 1988).
224. Stalemate in the Gulf War: Iran-Iraq 1985, supra note 88, at 171.
225. The Circassian, 69 U.S. (2 Wall.) 135 (1864).
226. The Adula, 176 U.S. 361 (1899).
227. McDougal and Feliciano, supra note 220, at 490.
228. Id.
229. Id. at 491.
230. Id. Under the assumption of this section, that Kuwait is a belligerent, this requirement poses no problem.
231. Id.

232. The William Bagaley, supra note 219.
233. The Brig Amy Warwick, 67 U.S. (2 Black) 635 (1862).
234. Until recently Iran was using patrol boats for attacks on neutral shipping. Iraq used jets. It is doubtful whether Iran could impose an effective blockade on Kuwait, even if other naval powers in the gulf permitted it. Christian Science Monitor, February 4, 1988, at 7, col. 3.
235. The point seems moot as a practical matter at this juncture. There have been no attacks on the re-flagged vessels since the United States retaliation against the Iranian oil platforms in October 1987.
236. Maley v. Shattuck, 7 U.S. (3 Cranch) 458 (1806).
237. Oppenheim, supra note 4, at 673.
238. Id.
239. Id.
240. Colombos, supra note 73, at 712.
241. Id.
242. The Newfoundland, 176 U.S. 97 (1899).
243. The Thompson, 70 U.S. (3 Wall.) 155 (1865).
244. The Olinde Rodriguez, 174 U.S. 510 (1898).
245. The Newfoundland, supra note 242, at 112.
246. Id. at 114.
247. Stone, supra note 73, at 412.
248. Id.
249. Id. at 514-515.
250. Mlyroie, supra note 36, at 24.
251. See infra notes 279-286 and accompanying text.
252. The Imina, 3 C. Rob. 167 (High Court of Admiralty in Prize 1800).
253. The Adula, supra note 226, at 361.

254. The Peterhoff, 72 U.S. (5 Wall.) 28 (1866).
255. Id.
256. Id.
257. This latter situation appears to be exactly what has occurred. See supra notes 68-73 and accompanying text. The reduction in cargo denominated as free cargo makes the difference in capture rules for violation of blockade versus carriage of contraband far less significant. See infra notes 262-286 and accompanying text.
258. Special Rep. No. 166, supra note 15, at 10.
259. Oppenheim, supra note 4, at 773.
260. Id.
261. Id. at 792.
262. The Bermuda, supra note 5, at 514.
263. Id.
264. Colombos, supra note 73, at 633.
265. Id. at 712.
266. The Nereide, 13 U.S. (9 Cranch) 388 (1815).
267. Grotius probably originated this classification. Oppenheim, supra note 4, at 800.
268. Id. at 801.
269. Id.
270. Id.
271. Id. at 805.
272. Id.
273. The belligerents treated coal and fuel as absolute contraband in both World Wars. Stone, supra note 73, at 479.
274. Oppenheim, supra note 4, at 811-812.
275. Hall, supra note 73, at 228.

276. Chief of Naval Operations, The Commander's Handbook on the Law of Naval Operations NWP 9, para. 7.7 (July 1987) (hereinafter Commander's Handbook).
277. Text accompanying notes 260-274 supra.
278. The distinction between absolute contraband and conditional contraband retains significance in the context of enemy destination. Enemy destination may be presumed for absolute contraband. It must be factually established for conditional contraband. Commander's Handbook, supra note 276, at para. 7.6.
279. Colombos, supra note 73, at 633-57.
280. Id.
281. The Kim, The Alfred Nobel, The Bjornstjerne Bjornson, The Fridland, 3 Lloyd's Pr. Cas. 167 (High Court of Justice in Prize 1915).
282. Id.
283. Stone, supra note 73, at 489.
284. McDougal and Feliciano, supra note 220, at 488.
285. Hall, supra note 73, at 217.
286. The rule was established in World War I when Great Britain attempted to capture margarine bound for Sweden which substituted for butter bound for Germany.
287. Hall, supra note 73, at 219-20.
288. Id.
289. Id. Visit and search procedures have always been very formal and exact. Hall, supra note 68, at 277. Absent special instructions or different rules of engagement, the United States Navy prescribes eight specific rules to be used for

visit and search. (1) Always use tact and consideration. (2) Summon the vessel to lie to. (3) If the vessel takes flight, it may be pursued and taken forcibly. (4) Send a boat with two officers over to conduct the visit and search. (5) If visit and search is hazardous, the neutral vessel may be escorted to a safe place for visit and search. (6) Papers should be examined first. (7) If doubt exists from the papers, the crew may be questioned, and the cargo may be searched. (8) The boarding officer will record the facts and circumstances of the visit in the recorded vessel's logbook. Commander's Handbook, supra note 276, at paras. 7.8 and 7.9.

290. The Nereide, supra note 266.
291. Id. at 428.
292. Colombos, supra note 73, at 711.
293. The Maria, 1 C. Rob. 340 (High Court of Admiralty in Prize 1799).
294. Id.
295. Northern Pac. Ry. Co. v. Amer. Trading Co., 195 U.S. 439 (1904). Hall, supra note 73, at 276.
296. Ultimately the court returned the vessel to its original owner, and condemned the cargo, swords, because of its contraband nature. The Springbok, 72 U.S. (5 Wall.) 1, 22-23 (1866).
297. The Nereide, supra note 266, at 428.
298. Id. at 427. Frasca, Visit, Search and Seizure on the High Seas 54 (1938).
299. The Anna Maria, 15 U.S. (2 Wheat.) 327 (1817).
300. The Antelope, 23 U.S. (10 Wheat.) 66, 119 (1825).
301. The Steamship Appam, 243 U.S. 124 (1917).



302. Colombos, supra note 73, at 712.
303. McDougal and Feliciano, supra note 220, at 489.
304. Id.
305. Id.
306. Ellery C. Stowell and Henry F. Munrow, International Cases on War and Neutrality, 467 (1916).
307. Hall, supra note 73, at 264.
308. Id. at 267.
309. Stowell and Munrow, supra note 306, at 477.
310. Commander's Handbook, supra note 276, at para. 7.7.
311. Id.
312. A change in the neutral vessel's status after certification invalidates the navicert. Id.
313. Another type of convoy exists where belligerent vessels escort neutral warships. The general rule is that neutral ships in this type of convoy are subject to capture. Stone, supra note 73, at 593-594.
314. Oppenheim, supra note 73, at 850.
315. Burdick H. Brittin, International Law for Seagoing Officers 276 (5th ed. 1986).
316. Hearings, supra note 93, at 120.
317. Id. Commander's Handbook, supra note 276, at para. 7.8.
318. Hearings, supra note 93, at 118-120. Interview with Captain Richard D. Debobes, supra note 223.
319. Interview with Captain Richard D. Debobes, supra note 223.
320. In late December 1987 an Iranian warship stopped a West German container ship, the Norasia Pearl, on suspicion that it was carrying cargo to Iraq. The vessel was taken to the Iranian port of Bandar-e

'Abbas for further examination prior to its release. Foreign Broadcast Information Service, December 31, 1987, at 37.

321. Special Rep. No. 166, supra note 15, at 2-3.
322. Current Policy No. 786, supra note 86, at 3.
323. Stowell and Munrow, supra note 306, at 476.
324. This was Justice Story's point in dissent in The Nereide. "The law deems the sailing under convoy as an act per se inconsistent with neutrality, as a premeditated attempt to oppose, if practicable, the right of search, and therefore attributes to such preliminary act the full effect of actual resistance." The Nereide, supra note 266, at 441 (Story, J., dissenting).
325. Frasca, supra note 298, at 112-115.
326. Security Arrangements in the Persian Gulf, supra note 175, at 1455. Arguably, the re-flagged tankers get better protection. Waterman Steamship Company, a United States flag carrier, refused to carry a consignment of M-60 tanks to Bahrain. Waterman asked the United States Government what protection it would receive in the Gulf, and was told that the United States "would monitor the ship's progress in the Gulf." There is a big difference between "monitoring" and escorting. Waterman declined to make the trip. Hearings, supra note 49, at 242 (additional questions submitted by Rep. Hutto and answers from the Department of State.)
327. Security Arrangements in the Persian Gulf, supra note 175, at 1454.
328. Id.

329. Id.
330. Id.
331. Hearings, supra note 93, at 120.
332. Id. Apparently the Iranians did accept a United States certification that the President Taylor had no contraband, but the Iranians had boarded the ship before certification. Hearings, supra note 49, at 242.
333. This communication can be conveyed to Iran through the Swiss Government. Hearings, supra note 93, at 119.
334. Statement of Foreign Minister Velayoti, supra note 160, at 119.
335. Text accompanying notes 152-158 supra.
336. Security Arrangements in the Persian Gulf, supra note 175, at 1458. Apparently tankers are not outfitted to carry anything but oil. Interview with Captain Debobes, supra note 223.
337. U.N. Charter art. 51.
338. General quarters is Condition I for United States Naval combatants. All weapons systems and sensors are manned. Escorting warships in the Persian Gulf are usually in Condition III, where one-third of the crew mans weapons for prolonged periods. Security Arrangements in the Persian Gulf, supra note 175, at 1455, 1463.
339. Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2d Cir. 1987).
340. Id. at 424.
341. Id. at 427. Under the Alien Tort Statute the plaintiff would have to be the Kuwaiti Oil Tanker Company rather than Chesapeake Shipping, Inc. as

- subject-matter jurisdiction is limited to torts against aliens. Alien Tort Statute of 1948, C. 646, § 1, 62 Stat. 869 (codified as amended at 28 U.S.C. § 1350 (1982)), Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. 1330, 1602-1611 (1982)).
342. The procedural requirements restricting execution of judgments in the Foreign Sovereign Immunities Act would still have to be addressed. Letelier v. Republic of Chile, 748 F.2d 790 (2d Cir. 1984), cert. denied, 471 U.S. 1125 (1985).
343. Special Rep. No. 166, supra note 15, at 11. Hearings, supra note 93, at 26 (statement of Senator Levin).
344. Black's Law Dictionary 69 (5th ed. 1979).
345. Id. at 141.
346. Norton, supra note 65, at 255.
347. Id. at 308.
348. "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. Charter art. 2, para. 4.
349. Norton, supra note 65, at 249-51.
350. Id.
351. Letter from the permanent representative of the Islamic Republic of Iran to the United Nations Secretary-General (August 11, 1987) (discussing Security Council Resolution 598) (reprinted in 26 I.L.M. 1481, 1482 (1987)).

- 352. Norton, supra note 65, at 252.
- 353. Id. -
- 354. Id. at 283-90.
- 355. Id. at 259-61.
- 356. Rubin, supra note 1, at 126.
- 357. Special Rep. No. 166, supra note 15, at 10.
- 358. The phrase is from Baxter, Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law, 16 Harv. Int'l L. J. 2 (1975).
- 359. Norton, supra note 65, at 249.
- 360. Christian Science Monitor, February 18, 1988, at 2, col. 3.
- 361. Washington Post, March 2, 1988, at A16, col. 3.
- 362. Letter from the Permanent Representative of the Islamic Republic of Iran to the United Nations Secretary General, supra note 349, at 1483.